TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 116.

HENRY BIGELOW WILLIAMS AND CHARLES F. AYER, TRUSTEES, PLAINTIFFS IN ERROR,

vs.

HOSEA M. KNOWLTON, ATTORNEY GENERAL OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED JUNE 30, 1902.

(18,198.)

(18,198.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 116.

HENRY BIGELOW WILLIAMS AND CHARLES F. AYER, TRUSTEES, PLAINTIFFS IN ERROR,

vs.

HOSEA M. KNOWLTON, ATTORNEY GENERAL OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Return	2	2
Record	3	2
Information	4	2
Subpœna	8	5
Return thereon	9	5
Appearance	10	6
Demurrer, plea, and answer	11	7
Joinder of issue on answer	17	12
Motion and joinder of issue on plea	17	12
Reservation for full court	18	13
Rescript	19	13
Amendment of information	20	13
Motion for continuance	21	14
Amendment of answer	23	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 2, 1902.

	Original.	Print
Motion to substitute a defendant	26	16
Motion to join city of Boston	28	17
Order thereon	29	17
Interlocutory appeal	29	17
Joinder of issue on amended answer	30	18
Motion for master	31	18
Order of court thereon	31	18
Interlocutory appeal	31	18
Demurrer, plea, and answer	32	18
Agreed facts	43	27
Memorandum and stipulation	67a	50
Reservation for full court	68	50
Rescript	69	50
Final decree of full court	72	51
Authentication of record	73	51
Application for writ of error	74	51
Assignment of errors	75	52
Opinion of full court, October 30, 1899	78	54
Opinion of full court, May 13, 1891	95	60
Original citation and return	99	62
Bond on writ of error	100	63
Final certificate of clerk of supreme judicial court	101	64

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Hosea M. Knowlton, attorney general of said State of Massachusetts, plaintiff and Henry Bigelow Williams and Charles F. Ayer, trustees, defendants, in an information in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Williams and Ayer, trustees, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the fourteenth day of June next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the sixteenth day of May in the year of our Lord one thousand nine hundred and one.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by

OLIVER WENDELL HOLMES,
Chief Justice Supreme Judicial Court of Massachusetts.

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

And now, here, the judges of the supreme judicial court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

[SEAL.] In testimony whereof, I, John Noble, clerk of said supreme judicial court for said county have hereto set my hand and the seal of said court this twentieth day of May A. D. 1901.

JOHN NOBLE, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among the records of our supreme judicial court holden at Boston within and for our said county of Suffolk, for the hearing of cases in equity, from the first day of January in the year of our Lord one thousand nine hundred and one and to the thirty-first day of December in said year, both days inclusive,—it is thus contained,—the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. In Equity.

HOSEA M. KNOWLTON, Attorney General, Plaintiff,
v.
HENRY BIGELOW WILLIAMS, of Boston, and BABSON S. LADD, of said Boston, Trustees of the Westminster Chambers Trust, so Called; The Westminster Construction Company, a Corporation Duly Established under the Laws of Maine and Having a Usual Place of Business at said Boston, and Isaac F. Woodbury, of said Boston, and George E. Leighton, of said Boston, Copartners under the Firm Name and Style of Woodbury & Leighton, Having a Usual Place of Business at said Boston, Defendants.

Information.

To the honorable the justices of the supreme judicial court within and for the county of Suffolk, in the Commonwealth of Massachusetts, sitting in equity:

Informing, showeth unto your honors Hosea M. Knowlton of New Bedford in the county of Bristol, attorney general of the Commonwealth of Massachusetts, at and by the relation of the Museum of

Fine Arts, a corporation duly established under the laws of this Commonwealth at Boston in said county of Suffolk, said relator owning real estate situated upon St. James avenue in said Boston, between Clarendon street and Dartmouth street, and in the immediate vicinity of the premises of the said Westminster Chambers Trust hereinafter referred to, and occupying the said real estate for the purposes of said corporation:

That the relator is a corporation established by the laws of this Commonwealth for the purpose of erecting a museum for the preservation and exhibition of works of art, of making, maintaining, and exhibiting collections of such works, and of affording instruction in the fine arts; that, in addition to its real estate, it is the owner of works of art of great value, many of which are in their nature irreplaceable, and for the convenient and complete examination of which free access of light is essential.

That said property is not employed for private gain, but is resorted to by the public in large numbers for its entertainment, instruction, and education.

That the expenses of said corporation are met from public and private subscription, and from the income of funds received and held upon public charitable trusts.

That Copley square, upon which said St. James avenue abuts, is an open square, and a public park intended for the use, benefit, and health of the public, and is surrounded by buildings devoted to religious, charitable, and educational purposes, some of which contain books, manuscripts, and works of art of great value, many of which are in their nature irreplaceable.

The said defendants Williams and Ladd, trustees under an instrument of trust dated July 1, 1897, and recorded with Suffolk deeds, Book 2462, page 501, are the owners of real estate situated at the corner of St. James avenue and Trinity place, between Dartmouth and Clarendon streets in said Boston, and are causing to be constructed and erected on said property an apartment house, commonly known as "Westminster Chambers," and have entered into contracts for the erection thereof with the said defendant Westminster Construction Company, and with the said defendants Woodbury & Leighton.

That the said defendants have built the walls of said building to a height exceeding 90 feet, exclusive of steeples, towers, domes, sculptured ornaments, and chimneys approved by the park commissioners of the city of Boston, and in violation of the act of the legislature hereinafter mentioned.

That, by chapter 452 of the Acts of the Year 1898, the erection of any building, exclusive of steeples, towers, domes, sculptured ornaments, and chimneys approved by the park commissioners of the city of Boston, above ninety (90) feet at said place is forbidden.

That the acts of the defendants in so constructing said building to an extreme height exceeding ninety (90) feet, save for steeples, towers, domes, sculptured ornaments, and chimneys approved by said park commissioners, will be not only a violation of the provisions

of said statute, but will also inflict great damage to the prop-
6 erty and rights of the relator, will be a serious injury to all estates in the neighborhood, and will constitute a public nuisance.

To the end, therefore, that said nuisance and intrusion upon the public right may be restrained, and said injury and damage be prevented, and that said defendants may answer make to all and singular the matters aforesaid:

May it please your honor to grant unto your orator a writ of subpœna, to be directed unto said defendants, thereby commanding them and each of them at a certain time and under a certain penalty therein to be limited, to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and further, to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet;

And also a writ of injunction, issuing out of and under the seal of this honorable court, temporarily enjoining and restraining said defendants, and each of them, and their servants and agents, from constructing, building, erecting, and maintaining said building, exclusive of such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may approve, above an extreme height of ninety (90) feet, until the further order of this court;

And also a writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining and restraining said defendants, and each of them, and their servants and agents, from constructing, building, erecting, and maintaining said building, exclusive of such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may approve, above an extreme height of ninety (90) feet.

HOSEA M. KNOWLTON,
Attorney General.

Filed September 17, 1898.

7 This information was filed and entered in this court on the seventeenth day of September, A. D. 1898, and a subpœna was thereupon issued as follows, to wit:

8 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

[SEAL.]

To Henry Bigelow Williams and Babson S. Ladd, both of Boston, in said county of Suffolk, trustees of the Westminster Chambers Trust, so called; The Westminster Construction Company, a corporation duly established under the laws of Maine and having a usual place of business at said Boston; Isaac F. Woodbury and George E. Leighton, both of said Boston, copartners under the firm name of Woodbury & Leighton, having a usual place of business at said Boston, Greeting:

We command you that you appear before our supreme judicial court at the rules to be holden at Boston within our said county of Suffolk, on the first Monday of October next, then and there to answer to an information exhibited against you in our said court by Hosea M. Knowlton of New Bedford in the county of Bristol, attorney general of said Commonwealth, at and by the relation of the Museum of Fine Arts, a corporation duly established under the laws of said Commonwealth at said Boston, and to do and receive what our said court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties in the law in that behalf provided.

Witness, Walbridge A. Field, Esquire, at Boston, the seventeenth day of September in the year of our Lord one thousand eight hundred and ninety-eight.

C. H. COOPER, *Ass't Clerk.*

9 Upon which subpœna are the following returns of the officers serving the same, viz:

SUFFOLK, *ss:*

BOSTON, *September 19th*, 1898.

I this day summoned the within-named Isaac F. Woodbury to appear and answer at court as within directed, by leaving at his last and usual place of abode an attested copy of this precept.

Service	.50
Copy	1.00
Travel	.52
H. & C.	.48
Pd. I. R. stamp	.10
	$2.40

JOSEPH P. SILSBURY, JR.,
Deputy Sheriff.

(I. R. stamp.)

I hereby certify that it was necessary to use a horse and carriage in serving the within process and that I actually used such conveyance 4 miles.

JOSEPH P. SILSBURY, JR.,
Deputy Sheriff.

SUFFOLK, *ss:*

BOSTON, *September 19th*, 1898.

I this day summoned the within-named Henry Bigelow Williams and Babson S. Ladd, as they are trustees of the Westminster Chambers Trust, so called, and on the same day I summoned the within-named George E. Leighton, each to appear and answer at court as within directed, by leaving at the last and usual place of abode of said Williams and said Ladd, and by delivering in hand to said Leighton, each an attested copy of this precept; and on said nineteenth day of September, 1898, I summoned the within-named corporation the Westminster Construction Company to appear and answer at court as within directed, by delivering to the commissioner of corporations of this Commonwealth, the true and lawful attorney for said corporation, upon whom service of all lawful process may be made in this Commonwealth, for said corporation, an attested copy of this precept together with the statute fee of two dollars.

Fees, service & tr	2.08
Copies	4.00
Paid commissioner	2.00
	$8.00

ROBERT E. MAGUIRE,
Deputy Sheriff.

[Endorsed:] No. 6428 Eq. Subpœna. Attorney General *ex rel.* *vs.* Henry B. Williams *et als.*

10 The plaintiff appeared by Elder, Wait & Whitman, Esquires, his attorneys, and appearance was afterwards entered for the defendants as follows, viz:

SUFFOLK, *ss:*

Supreme Judicial Court, Nov. 2nd, 1898.

ATTORNEY GENERAL, Pl'ff,
v.
HENRY B. WILLIAMS ET ALS., D'f'ts. } No. 6428. Eq.

In the above action I appear for defendants.

A. E. PILLSBURY,
(F. B. L.)

SUFFOLK, *ss:*

Supreme Judicial Court.

Filed Nov. 2, 1898.
Attest: C. H. COOPER, *Ass't Clerk.*

And on the eighth day of November in said year the defendants filed by consent, their demurrer, plea and answer, as follows, to wit:

11 *Defendants' Demurrer, Plea, and Answer.*

The defendants demur to the information, on the ground that the same does not set forth or disclose any equitable jurisdiction or right to equitable relief against the defendants, for the following reasons:—

First. The information does not disclose a case in which the Attorney General has any right to interfere in equity, or of which the court will take jurisdiction in equity on information of the attorney general.

Second. The statute upon which the information is brought, chapter 452 of the Acts of the Legislature of the Year 1898, in its application to the defendants, is in violation of articles I, X, XII, and XXX of the declaration of rights, and of other provisions of the constitution of this Commonwealth, and is in violation of the second clause of section 1 of the fourteenth amendment and of other provisions of the Constitution of the United States, and is inoperative and ineffectual to sustain the information.

And without waiving the foregoing demurrer, but insisting thereon, the defendants further say, by way of plea to the information, as follows:—

First. That since the information was filed the board of park commissioners of the city of Boston, by vote of which a copy is hereto annexed, by virtue and in the exercise of the power conferred on them by section 1 of said chapter 452 of the Acts of 1898, have duly approved that part of the defendants' building referred
12 to in the information which is above the height of ninety feet, being an architrave, frieze, and cornice of sculptured ornament; and that said building is in all respects a lawful structure; and the defendants rely on this special matter in bar of the plaintiff's information.

Second. And further, by way of plea, the defendants say that said chapter 452 of the Acts of the Year 1898 is an act relating to the erection or alteration of buildings or other structures in the city of Boston, and is in fact a local police regulation, and no more; that by chapter 257 of the Acts of the Legislature of the Year 1894 the city of Boston is given an express remedy in equity to enforce or prevent the violation of this act and of all like acts; that such remedy is exclusive, and said act of 1898 can be enforced only by the city of Boston; that by virtue of said act of 1894 the city of Boston filed in this court, and in this county, July 25, 1898, a bill in equity against all the defendants herein, to enforce the provisions of said act of 1898, and to prevent any violation thereof by the defendants, the subject-matter and purpose of which bill is the same as of this information; to which bill the defendants have duly appeared and answered, and they will produce at the hearing hereof copies of said bill and of their answers thereto, and said cause is still pending in this court; that pending said cause neither the attorney general nor

any other person has any right or authority to interfere for the enforcement of said act of 1898; and that the pendency of said bill of the city of Boston is a bar to this information.

And without waiving the foregoing demurrer or pleas, or any other rights of the defendants, the defendants answer the information as follows:—

1. They admit that the relator, The Museum of Fine Arts, is a corporation established under the laws of this Commonwealth at Boston, owning and occupying real estate in Boston as alleged in the information; but they allege that all that part of the information which relates to the character and purposes of the relator is impertinent and immaterial, and they are advised that the same need not be further answered. They deny that said relator corporation is a public charitable corporation, or a public charitable trust, and say that it is a private corporation, existing solely for the purpose of making and maintaining art collections under such regulations as its members and trustees may establish; that the public has no rights or interests therein, save the general right of regulation and control which the public has over all corporations; and that there is nothing in the character or purposes of said corporation, or in the acts of the defendants as set forth in the information, which authorizes the attorney general to file or maintain this information as for the enforcement of a public charitable trust.

2. The defendants deny that Copley square is an open square or public park intended for the use, benefit, and health of the public, and say that Copley square in law consists of a triangular piece of vacant land enclosed by Boylston street, Dartmouth street, and Huntington avenue, and a smaller triangular piece of land enclosed by Huntington avenue, St. James avenue, and Trinity place in the city of Boston, and nothing more. They deny that Copley
13 square is or ever was a public park, and say that Copley square, as here described, and as it is in law, is part of the public lands of the city of Boston, within the jurisdiction and control of the city committee on public lands; that the same has never been laid out or dedicated as a public park, and has never been within the jurisdiction or control of the park department of said city; and they further say that Copley square in the popular sense is composed of said two triangular pieces of land and of the streets hereinbefore mentioned which surround the same; and that no part of Copley square, however described, is or ever was a public park.

3. The defendants admit that the defendants Williams and Ladd, trustees, are the owners of real estate situated at the corner of St. James avenue and Trinity place as alleged in the information, and that at and long before the time of the filing thereof they were causing to be erected on said property an apartment house known as the Westminster Chambers, and in August, 1897, had entered into contracts for the erection thereof with the defendant The Westminster Construction Company, which had entered into a subcontract for part of the construction thereof with the defendants Woodbury & Leighton.

4. The defendants deny that they have built the walls of said

building to a height exceeding ninety feet, exclusive of steeples, towers, domes, sculptured ornaments, and chimneys approved by the park commissioners of the city of Boston, or in violation of chapter 452 of the Acts of the Year 1898. They deny that the construction of said building in any particular in violation of law, or that the same does or ever will constitute a public nuisance; and, while they are advised that the allegation of the information that the defendants' building will inflict great damage to the property and rights of the relator, and will be a serious injury to all the estates in the neighborhood, is impertinent and immaterial, and need not be further answered, they deny said allegation.

5. The defendants' building, referred to in the bill, the Westminster Chambers, is a building constructed and designed for residential apartments of the best character. It is of the dimensions of one hundred forty-eight and a half feet on St. James avenue and one hundred feet on Trinity place, and was originally designed to be of ten stories, of the extreme height of one hundred twenty feet, and to cost with the land on which it stands one million dollars. It is built of steel, brick, and terra-cotta, in the most thorough and substantial manner, being fireproof and in all respects absolutely safe. The exterior is embellished with sculptured figures and other ornaments, and is of attractive appearance, and the building as a whole is of the most desirable character, and is a public improvement and a benefit to the neighborhood in which it stands.

6. On or before September 1, 1897, the defendants had acquired the land on which the building stands, at a cost of about three hundred and fifty thousand dollars ($350,000), for the sole purpose of erecting this building thereon; and had entered into valid and binding contracts, as above set forth and otherwise, for the
14 erection of the entire building as originally designed and for the manufacture and delivery of all the material therefor, most of which was specially designed for and adapted to this building, and adapted to no other use, to the amount of not less than six hundred and fifty-four thousand eight hundred dollars ($654,800).

7. Before the defendants began the construction of the building, or contracted therefor, the city of Boston, by its building commissioner thereto duly authorized, on or about July 1, 1897, issued to the defendants a permit and license for the construction of the building, in accordance with plans thereof then filed with the building department of the city, to the height of one hundred and twenty feet, being ten stories with a cornice, as authorized by law. On the faith of such permit and license the defendants demolished the six dwelling-houses, with their appurtenances, which then stood upon the land, and began the construction of the new building in accordance with the permit, and proceeded continuously therewith until the filing of this information.

8. At the time of the passage of the act of 1898, May 23, 1898, the building was partially erected to the height of eight stories, and the defendants had then expended in the purchase and preparation of the land and putting in the foundations, and in the construction of the building so far as it had then proceeded, not less than five

hundred and fifty thousand dollars; and the above-mentioned contracts for the erection of the building which then remained wholly or partially unperformed amounted to not less than four hundred and fifty thousand dollars.

9. At the time of the filing of this information, September 17, 1898, the defendants had expended upon the building, in addition to the cost of the land, not less than four hundred and thirty-five thousand dollars; and the aforesaid contracts for the construction thereof still remained in force to be completed, to the amount of about two hundred and twenty thousand dollars; and at said date the defendants had substantially carried the building to a height of eight stories, with an architrave, frieze, and cornice of sculptured ornament thereon. To enforce the statute of 1898 upon the defendants, could it be enforced, would occasion them actual loss and damage in a sum not less than three hundred thousand dollars, which the provisions of the statute are not adequate to make good, even if valid.

10. The defendants say that by the laches and delay of the informant in failing to file his information seasonably, or until the building had reached the stage, and the enterprise had involved the expenditure, hereinabove set forth, he is barred and estopped to maintain the information.

11. Of the five other parcels of land about Copley square to which alone the limitation of ninety feet in the act of 1898 applies, one is occupied by Trinity church, one by the Museum of Fine Arts, one by the Pierce building, so called, one by the Boston public library, and one by the Old South church. All these are public buildings of permanent character, which are unlikely ever to be demolished, rebuilt, or materially altered within any period of practical cognizance. Trinity church, which is directly opposite the defendants' building and nearest to it on the north side, has a main central tower of very large dimensions, approaching in its dimensions the size of that part of the main building on which it is placed, of the height of 222 feet, and two smaller towers of the height of 109 feet. The Pierce building is of the extreme height of 116 feet. The public library is of the extreme height of 92 feet to the highest part of the roof, and 102 feet to the top of the final. The Old South church has a large tower or steeple of the height of 220 feet. The application of the ninety-feet limitation of the act of 1898 to the lots on which these buildings stand, as well as to the land of the defendants, is designed to make the statute appear as though this limitation is impartially applied to a comparatively large territory, but in truth it applies for any practical purpose of restraint only to the defendants' land. The defendants' building is the only building on any of the lands described in the statute "the construction whereof was begun but not completed before the fourteenth day of January in the current year," as described in the statute, and is the only building to which any of the provisions of section 3 of the statute apply or can ever apply. The statute was in fact procured and passed with the sole purpose and intent to preserve and protect the supposed architectural attractions of the open

space in Boston popularly known as Copley square, and to prevent the erection there of any other building so high as to interfere with the architectural appearance or effect of the particular buildings before named, or disturb the supposed architectural symmetry of the square as it now is, and is in fact directed solely against the defendants' building, especially in the interest and for the benefit of the Museum of Fine Arts and Trinity church, which are the nearest buildings on either hand to the defendants' building, and the only buildings about Copley square or elsewhere which the defendants' building will in anywise affect. The defendants will produce at the hearing a map or plan of Copley square, showing the height and relative situation of the various buildings referred to herein or in the act of 1898, and other buildings on or near Copley square, and other circumstances material to the questions hereby raised which cannot be conveniently set out or shown herein.

12. The defendants further say that the information is not brought for the enforcement of any public charity, or the restraint or prevention of any public nuisance; they deny that the Westminster Chambers constitutes, or that it will constitute, a public nuisance; and they say that no facts are disclosed in the information, and no facts exist, which require or authorize the attorney general to file or prosecute the information, or the court to entertain jurisdiction thereof, either on the ground of public charitable trust or public nuisance, or any other legal ground.

13. The defendants further say that since the information was filed all that part of their building which is above the height of ninety feet, being an architrave, frieze, and cornice of sculptured ornament, has been duly approved by the board of park
16 commissioners of the city of Boston, as authorized by said act of 1898, as more fully set out in the first plea to the information, and that the building is in all respects a lawful structure.

14. The defendants further rely, by way of answer to the information, upon the pendency of the suit by the city of Boston against them under the statute of 1894, as more fully set out in the second plea to the information, the pendency of which suit is a bar to the maintenance of this information.

15. The defendants are advised and allege that the statute of 1898, upon which the information is founded, in its application to the defendants, is in violation of articles I, X, XII, and XXX of the declaration of rights, and of other provisions of the constitution of this Commonwealth, and is in violation of the second clause of section 1 of the fourteenth amendment, and of other provisions of the Constitution of the United States; that it rests upon no lawful or proper ground of the exercise of the legislative powers therein attempted to be exercised, and that it is not a proper or valid exercise of any power of the legislature; that it is arbitrary, oppressive, discriminating, partial, and unequal; and that, as applied to the defendants or to their land described in the bill, under and in view of the facts and circumstances herein set forth, it is inoperative and ineffectual to sustain the information.

And the defendants deny every other allegation of the information not hereinabove admitted, denied, or otherwise answered.

A. E. PILLSBURY,
Solicitor and of Counsel for the Defendants.

I certify that the foregoing demurrer is not intended for delay.

A. E. PILLSBURY.

Filed, by consent, November 8, 1898.

(*Copy of Vote.*)

City of Boston.

In board of park commissioners.

OCTOBER 31, 1898.

Voted, by virtue of and in the exercise of the power conferred upon this board by chapter 452 of the Acts of the Year 1898, that the sculptured ornaments erected on the building situated at the corner of St. James avenue and Trinity place, known as the Westminster Chambers, above the height of ninety feet, as shown in the plans thereof, submitted to the board and in the building as now erected, be and the same are hereby approved.

17 And on the twenty-sixth day of said November, the plaintiff joined issue on the defendants' answer as follows:—

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

ATTORNEY GENERAL
vs.
HENRY BIGELOW WILLIAMS, Trustee, ET ALS.

Now comes the complainant in the above-entitled case and joins issue upon the answer.

By his attorneys, ELDER, WAIT & WHITMAN.

And on the tenth day of December in said year, the following motion to set aside plea, and joinder of issue on plea was filed, viz:—

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* *ss:*

Supreme Judicial Court. In Equity.

ATTORNEY GENERAL *ex Rel.*
vs.
WILLIAMS ET ALS.

Joinder of Issue on the Plea, &c.

And now comes the Attorney General and moves to set aside the plea for insufficiency, and not waiving said motion but insisting thereupon, joins issue on the plea.

By his attorneys, ELDER, WAIT & WHITMAN.

18 Thereupon on the thirtieth day of said December, the case was reserved for the consideration of the full court, upon the report of the justice who presided at the hearing.

And afterwards, to wit, on the thirtieth day of October A. D. 1899, it was ordered by the supreme judicial court for the Commonwealth, by its rescript, as follows, to wit:

19 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth.

AT BOSTON, *Oct.* 30, 1899.

In the case of—

HOSEA M. KNOWLTON, Attorney General,
vs.
HENRY BIGELOW WILLIAMS ET AL.

pending in the supreme judicial court for the county of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Demurrer and pleas overruled.
By the court,

HENRY A. CLAPP, *Clerk.*

October 30, 1899.

[Endorsed:] 6428 Eq. No. 463 Eq. Supreme judicial court for the Commonwealth. Rescript, Suffolk county. Hosea M. Knowlton att'y gen. *vs.* Henry Bigelow Williams *et al.*

20 And on the thirtieth day of January, A. D. 1900, the plaintiff filed his motion for amendment of information, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss.*:

Supreme Judicial Court. In Equity.

HOSEA M. KNOWLTON, Attorney General,
vs.
HENRY BIGELOW WILLIAMS ET AL.

Motion for Amendment of the Information.

And now comes the Attorney General in the above-entitled case and moves that the information heretofore filed may be amended by striking therefrom the Museum of Fine Arts as the relator therein.

By his attorneys, ELDER, WAIT & WHITMAN.

Which motion upon hearing was allowed.

And on said thirtieth day of January the defendants filed their motion for continuance as follows, to wit:

21 Supreme Judicial Court.

ATTORNEY GENERAL
v.
HENRY B. WILLIAMS ET ALS.

The defendants now represent to the court that St. 1898, chap. 452, sought to be enforced in this case, imposing a limitation upon the height of their building known as the Westminster Chambers, purports to give them damages, to be paid by the city of Boston, for the easement taken in their estate and the injury occasioned them by such limitation in height. They have brought an action against the city for such damages, and the same is now pending in the superior court in Suffolk county. The City of Boston claims that the statute is unconstitutional, in that the city cannot be required to pay damages for lands or interests in lands taken to such a use as that for which the statute was passed, and refuses to pay damages therefor unless and until its liability so to do is conclusively settled in the pending action brought to recover the damages. The purpose of the present information is to restrain the defendants from maintaining the architrave, frieze and cornice upon their building above the height of ninety feet. If they should be so restrained, they would thereby be greatly damaged, beyond the amount of the damages already occasioned them by the statute. Under these circumstances it is unjust and inequitable that the defendants should be restrained from maintaining the architrave, frieze and cornice, or that it should be sought to obtain a conclusive determination
22 of their right to maintain them, or that they should be harrassed by litigation on account thereof, until it is settled that they have a constitutional right to full compensation for the easement in their land taken by the statute, and to the damages which they will suffer if their right to maintain the structure is interfered with; which question cannot be determined upon the present information, but can only be determined in the pending action for damages against the city of Boston.

The superstructure of the building was fully completed more than a year ago, and there is not, and never has been, any purpose to carry it higher, unless and until it is judicially determined that the owners have a right so to do, and there is no exigency for pressing this information to hearing and decision in advance of the action for damages.

The defendants accordingly move that the further hearing of the present information be continued, to await determination of the question whether the statute is valid and effectual to secure to them the compensation required by the constitution for their property taken, and the damages thereto.

A. E. PILLSBURY,
Sol'r & of Counsel for Def'ts.

~~This motion upon hearing was allowed.~~

23 And on the second day of October in said year the defendants moved to amend their answer, as follows, to wit:

SUFFOLK, *ss*:

Supreme Judicial Court. In Equity.

ATTORNEY GENERAL
v.
HENRY BIGELOW WILLIAMS, Trustee, ET ALS.

Amendment of Answer.

The defendants move to amend their answer heretofore filed by adding thereto the following:—

The defendants further say that the statute of 1898 upon which the information is based is an attempt to exercise the power of eminent domain, by taking certain interests or easements in the property of the defendants, and providing compensation therefor; that the validity of the taking depends upon the validity of the provisions for compensation; that unless the provisions for compensation are valid and effectual, the attempted taking is invalid and the public has acquired no rights in or to the property of the defendants; that the statute does not require the city of Boston or any other authority to make any award to the defendants of damages or compensation for such taking, but provided compensation only by requiring the city to pay such damages as a jury may find to have been caused to the property of the defendants, in an action

24 to be brought by them; that the defendants have brought such action, and the same is now pending, but the city denies its obligation to pay any compensation or damages to the defendants; that the city had not at the time of the passage of the statute, nor at any time since, any moneys appropriated to this purpose, nor any specific power or authority to raise, appropriate or pay money for such a purpose; that the power of the city to raise and appropriate money for any and all purposes is limited and restricted by the laws of the Commonwealth relating to municipal indebtedness; that the city denies, and the officers of the city who control its action in such a case deny, the obligation or power of the city to raise, appropriate or pay money for such a purpose, and the power of the legislature to require the city so to do, and the city refuses to pay the defendants any damages or compensation whatever, unless and until it is conclusively determined as against the city that the statute is constitutional and the requirement to pay damages valid and binding, and the defendants have no power to require or compel the city so to do; that the validity or sufficiency of the provisions for compensation as against the city cannot be determined in this proceeding, to which the city is not a party; that the defendants' building was substantially completed at its present height, as described in paragraph 9 of this answer, at the time of filing the information, and has never since been carried any higher, and the defendants have not and never have had any purpose to

carry it higher, unless and until it is authoritatively determined that they have a right so to do; that the interruption of the light and air of Copley square by that part of the building which is alleged to be in violation of the statute is slight and inconsequential, and constitutes no substan-
25 tial interference with any public rights in Copley square or otherwise; that there is no exigency which requires or justifies the prosecution of this information in advance of a conclusive determination of the rights of the public in the property of the defendants, if any, and the rights of the defendants to compensation therefor, which determination cannot be had in this proceeding; and that in view of the premises it is unjust and inequitable in this state of the case to further prosecute this information for the purpose of restraining the defendants from the use of their property, or of requiring them to demolish any part of their building; and that if the informant seeks to further prosecute the same, he should be required to join the City of Boston as a party thereto, in order that the rights of the public in the defendants' property, if any, and the right of the defendants to compensation therefor, may be conclusively determined in this proceeding.

And the defendants further say that for the reasons hereinabove set forth, as well as for the reasons set forth in their original answer, the statute of 1898 in its application to the defendants is in violation of articles 1 and X of the declaration of rights and of other provisions of the constitution of this Commonwealth, and of the second clause of section 1 of the fourteenth amendment and of other provisions of the Constitution of the United States.

A. E. PILLSBURY,
For the Def'ts.

26 Which motion upon hearing was allowed, the following endorsement being made thereon, viz:
October 2, 1900. Allowed, per Barker, J.

And on said second day of October the defendants filed the following motion to substitute party defendant, viz:

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

ATTORNEY GENERAL
v.
HENRY BIGELOW WILLIAMS, Trustee, ET ALS.

The defendants now represent to the court that since the filing of the information Babson S. Ladd, a party defendant thereto, has resigned the office of trustee of the Westminster Chambers Trust, and Charles F. Ayer of Boston, in the county of Suffolk, has been appointed trustee thereof in his place; and the defendants accord-

ingly move that said Charles F. Ayer be admitted as a party defendant in place of said Babson S. Ladd.

A. E. PILLSBURY,
For the Def'ts.

27 Which motion upon hearing was allowed.

And on said second day of October the defendants also filed their motion to join City of Boston as party, viz:

28 *Motion that City of Boston Be Joined.*

The defendants now represent that they desire to ascertain what alterations of their building described in the information are necessary to make it conform to the opinion of the court heretofore rendered on the demurrer and pleas in this cause, without prejudice to their right to further defend upon the merits, or any other rights; that as the statute of 1898, on which the information is based, purports to make the City of Boston liable to the defendants for any damages occasioned them by the operation of the statute, the character and extent of such alterations cannot be conclusively determined in this proceeding unless and until the City of Boston is made a party thereto; and that if such alterations are ascertained and made by the defendants without joinder of the City of Boston as a party thereto, the defendants will incur the risk of loss, and of having thereafter to make different or further alterations in their building, which risks they ought not to be required to incur. Wherefore, for this reason, and for other grounds and reasons appearing in their answer, the defendants move that the informant be required to join the City of Boston as a party defendant to this information, as a condition of further prosecuting the same, and that in default of such joinder the further prosecution thereof be stayed until the right of the defendants to compensation for all damages occasioned to their property by the operation of said statute, and the liability of the City of Boston therefor, are conclusively determined.

A. E. PILLSBURY,
For the Defendants.

Filed October 2, 1900.

29 Which motion, upon hearing was denied, the following endorsement being made thereon, viz:

October 5, 1900. Motion denied, per Barker, J.

And on said fifth day of October, the defendants appealed from the denial of said motion, as follows, to wit:

Please note our appeal from denial of our motion.
Filed October 5, 1900.

A. E. PILLSBURY.

And on the eleventh day of said October the plaintiff joined issue on the defendants' answer as amended, as follows, to wit:

30 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Supreme Judicial Court. In Equity.

ATTORNEY GENERAL
vs.
HENRY BIGELOW WILLIAMS ET AL.

Replication.

And now comes the complainant in the above-entitled case and joins issue upon the amended answer.

By his attorneys, ELDER, WAIT & WHITMAN.

And on the seventh day of November in said year, the defendants filed a motion for the appointment of master &c., as follows, to wit:

31 Supreme Judicial Court.

ATTORNEY GENERAL
v.
HENRY B. WILLIAMS and Others.

The defendants now represent that they desire to ascertain what alterations of their building described in the information, if any, are necessary to make it conform to the statute of 1898 ch. 452, in view of the decision and opinion of the court heretofore rendered on the demurrer and plea; with a view to make such alterations, and thereby avoid farther litigation, if the same can be done without undue loss or damage.

Wherefore they move that the case be now referred to a master, or stand for hearing by the court, upon this question, without prejudice to any other rights of the defendants.

A. E. PILLSBURY,
For the Defendants.

Which motion upon hearing was denied.

And on the eleventh day of December in said year the defendants appeal from the denial of said motion.

And on the thirteenth day of said December the defendants by consent filed their demurrer, plea and answer as amended, to wit:

32 *Defendants' Demurrer, Plea, and Answer.*

The defendants demur to the information, on the ground that the same does not set forth or disclose any equitable jurisdiction or right to equitable relief against the defendants, for the following reasons:—

First. The information does not disclose a case in which the attorney general has any right to interfere in equity, or of which the court will take jurisdiction in equity, on information of the attorney general.

Second. The statute upon which the information is brought, chapter 452 of the Acts of the Legislature of the Year 1898, in its application to the defendants, is in violation of articles I., X., XII., and XXX. of the declaration of rights, and of other provisions of the constitution of this Commonwealth, and is in violation of the second clause of section 1 of the fourteenth amendment and of other provisions of the Constitution of the United States, and is inoperative and ineffectual to sustain the information.

And without waiving the foregoing demurrer, but insisting thereon, the defendants further say, by way of plea to the information, as follows:—

First. That since the information was filed the board of park commissioners of the city of Boston, by vote of which a copy is subjoined, by virtue and in the exercise of the power conferred on them by section 1 of said chapter 452 of the Acts of 1898, have duly approved that part of the defendants' building referred to in the information which is above the height of ninety feet, being an architrave, frieze, and cornice of sculptured ornament; and that said building is in all respects a lawful structure; and the defendants rely on this special matter in bar of the plaintiff's information.

"City of Boston.

In board of park commissioners.

October 31, 1898.

Voted, by virtue of and in the exercise of the power conferred upon this board by chapter 452 of the Acts of the year 1898,
33 that the sculptured ornaments erected on the building situated at the corner of St. James avenue and Trinity place, known as the Westminster Chambers, above the height of ninety feet, as shown in the plans thereof submitted to the board and in the building as now erected, be and the same are hereby approved."

Second. And further, by way of plea, the defendants say that said chapter 452 of the Acts of the Year 1898 is an act relating to the erection or alteration of buildings or other structures in the city of Boston, and is in effect a local regulation and no more; that by chapter 257 of the Acts of the Legislature of the Year 1894, the city of Boston is given an express remedy in equity to enforce or prevent the violation of this act and all like acts; that such remedy is exclusive, and said act of 1898 can be enforced only by the City of Boston; that by virtue of said act of 1894 the City of Boston filed in this court and in this county, July 25, 1898, a bill in equity against all the defendants herein, to enforce the provisions of said act of 1898, and to prevent any violation thereof by the defendants, the subject-matter and purpose of which bill is the same as of this information; to which bill the defendants have duly appeared and answered, and they will produce at the hearing hereof copies of said bill and of their answers thereto; and said cause is still pending in this court. That pending said cause neither the attorney general nor any other person has any right or authority to interfere for the enforcement

of said act of 1898; and that the pendency of said bill of the City of Boston is a bar to this information.

And without waiving the foregoing demurrer or pleas, or any other rights, the defendants answer the information as follows:—

1 They admit that the relator, The Museum of Fine Arts, is a corporation established under the laws of this Commonwealth at Boston, owning and occupying real estate in Boston as alleged in the information; but they allege that all that part of the information which relates to the character and purposes of the relator is impertinent and immaterial, and they are advised that the same need not be further answered. They deny that said relator corporation is a public charitable corporation or a public charitable trust, and say that it is a private corporation existing solely for the purpose of making and maintaining art collections, under such regulations as its members and trustees may establish; that the public has no rights or interests therein, save the general right of regulation and control which the public has over all corporations; and that there is nothing in the character or purposes of said corporation, or in the acts of the defendants as set forth in the information, which authorizes the attorney general to file or maintain this information as for the enforcement of a public charitable trust.

2. The defendants deny that Copley square is an open square or public park intended for the use, benefit, and health of the
34 public, and say that Copley square in law consists of a triangular piece of vacant land enclosed by Boylston street, Dartmouth street, and Huntington avenue, and a smaller triangular piece of land enclosed by Huntington avenue, St. James avenue, and Trinity place in the city or Boston, and nothing more. They deny that Copley square is or ever was a public park, and say that Copley square, as here described, and as it is in law, is part of the public lands of the city of Boston, within the jurisdiction and control of the city committee on public lands; that the same has never been laid out or dedicated as a public park, and has never been within the jurisdiction or control of the park department of said city; and they further say that Copley square, in the popular sense, is composed of said two triangular pieces of land and of the streets hereinbefore mentioned which surround the same; and that no part of Copley square, however described, is or ever was a public park.

3. The defendants admit that the defendants Williams and Ladd, trustees, are the owners of the real estate situated at the corner of St. James avenue and Trinity place as alleged in the information, and that at and long before the time of the filing thereof they were causing to be erected on said property an apartment house known as the Westminster Chambers, and in September, 1897, had entered into a contract for the erection thereof with the defendant The Westminster Construction Company, which had entered a subcontract for part of the construction thereof with the defendants Woodbury & Leighton. The defendants further say that the defendant Westminster Construction Company, under and in partial payment for performance of its contract, received and became the owner of 3,869 shares of the trust stock issued by the defendants Williams

and Ladd, trustees, representing an ownership of about $\frac{3}{8}$ of the building and land, and that the defendants Woodbury & Leighton, under and in partial payment for their said contract, received and became owners of 300 of said shares, representing an ownership of about $\frac{1}{32}$ of said building and land.

4. The defendants deny that they have built the walls of said building to a height exceeding ninety feet exclusive of steeples, towers, domes, sculptural ornaments, and chimneys approved by the park commissions of the city of Boston, or in violation of chapter 452 of the Acts of the Year 1898. They deny that the construction of said building is in any particular in violation of law, or that the same does or ever will constitute a public nuisance; and while they are advised that the allegations of the information that the defendants' building will inflict great damage to the property and rights of the relator, and will be a serious injury to all the estates in the neighborhood, is impertinent and immaterial and need not be further answered, they deny said allegation.

5. The defendants' building referred to in the bill, the Westminster Chambers, is a building designed and constructed for residential apartments of the best character. It is of the dimensions of 148½ feet on St. James avenue and 100 feet on Trinity place, and was originally designed to be of ten stories, of the extreme height of 120 feet, and to cost, with the land on which it stands, $1,000,000. It is built of steel, brick, and terra-cotta, in the most thorough and substantial manner, being fireproof and in all respects absolutely safe. The exterior is embellished with sculptural figures and other ornaments, and is of attractive appearance, and the building as a whole is of the most desirable character, and is a public improvement, and a benefit to the neighborhood in which it stands.

6. On or before September 1, 1897, the defendants had acquired the land on which the building stands at a cost of about three hundred and fifty thousand dollars ($350,000), for the purpose of erecting this building thereon; and had entered into valid and binding contracts, as above set forth and otherwise, for the erection of the entire building as originally designed, and for the manufacture and delivery of all the material therefor, most of which was specially designed for and adapted to this building, and adapted to no other use, to the amount of not less than six hundred fifty-four thousand eight hundred dollars ($654,800).

7. Before the defendants began the construction of the building, or contracted therefor, the city of Boston, by its building commissioner thereto duly authorized, on or about July 1, 1897, issued to the defendants a permit and license for the construction of the building, in accordance with plans thereof then filed with the building department of the city, to the height of 120 feet, being ten stories, with an architrave, frieze, and cornice, as authorized by law. On the faith of such permit and license, the defendants demolished the six dwelling-houses, with their appurtenances, which then stood upon the land, and began the construction of the new building in accordance with the permit, and proceeded continuously therewith until the filing of this information.

8. At the time of the passage of the act of 1898, May 23, 1898, the building was partially erected to the height of eight stories, and the defendants had then expended in the purchase and preparation of the land and putting in the foundations, and in the construction of the building so far as it had then proceeded, not less than five hundred and fifty thousand dollars; and the above-mentioned contracts for the erection of the building which then remained wholly or partially unperformed amounted to not less than four hundred and fifty thousand dollars.

9. At the time of the filing of this information, September 17, 1898, the defendants had expended upon the building, in addition to the cost of the land, not less than four hundred and thirty-five thousand dollars; and the aforesaid contracts for the construction thereof still remained in force to be completed to the amount of about two hundred and twenty thousand dollars; and at said date the defendants had substantially carried the building to a height of eight stories, with an architrave, frieze, and cornice of sculptured ornament thereon. To enforce the statute of 1898 upon the defendants, could it be enforced, would occasion them actual loss and damage in a sum not less than three hundred thousand dol-
36 lars, for which the provisions of the statute, if otherwise valid, are not adequate to yield just compensation.

10. The defendants say that by the laches and delay of the informant in failing to file his information seasonably, or until the building had reached the stage, and the enterprise had involved the expenditure, hereinabove set forth, he is barred and estopped to maintain the information.

11. Of the five other parcels of land about Copley square to which alone the limitation of 90 feet in the act of 1898 applies, one is occupied by Trinity church, one by the Museum of Fine Arts, one by the Pierce building, so called, one by the Boston public library, and one by the Old South church. All these are large, massive, and costly public buildings of permanent character, which are unlikely to be demolished, rebuilt, or materially altered. Trinity church, which is directly opposite the defendants' building, and nearest to it on the north side, has a main central tower, 56½ feet square and of the height of 222 feet 8 inches, and two smaller towers, each of the height of 108 feet 10 inches. The Pierce building is of the extreme height of 116 feet. The public library is of the height of 92 feet to the highest part of the roof, and 102 feet to the top of the finial. The Old South church has a large tower of the dimensions of 28 by 23 feet and of the height of 223 feet. The application of the 90-feet limitation of the act of 1898 to the lots on which these buildings stand, as well as to the land of the defendants, is designed to make the statute appear as though this limitation is impartially applied to other lands as well as to the defendants', but in truth it applies for any practical purpose of restraint only to the defendants' land. The defendants' building is the only building on any of the lands described in the statute "the construction whereof was begun but not completed before the fourteenth day of January in the current year," as described in the statute, and is the only building to

which any of the provisions of section 3 of the statute apply or can ever apply. The statute was in fact procured and passed without any purpose to protect the light or air of Copley square as a park or otherwise, and without any reference thereto, but with the sole purpose and intent of preserving and protecting the supposed architectural attractions of the open space popularly known as Copley square, and to prevent the erection there of any other building so high as to interfere with the architectural appearance or effect of the particular buildings before named, especially Trinity church and the Art Museum, or to disturb the supposed architectural symmetry or effect of the square; and was in fact directed solely against the defendants' building, especially in the interest and for the benefit of the Museum of Fine Arts and Trinity church, which are the nearest buildings on either hand to the defendants' building, and the only buildings about Copley square or elsewhere which the defendants' building will in anywise affect. The other buildings above named, especially Trinity church and the Art Museum, interfere with
37 the light and air of Copley square more than the defendants' building does or ever will, and the defendants' building does not and never will materially interfere with the light or air of the square, or otherwise injure it. The defendants will produce at the hearing maps or plans of Copley square showing the height and relative situation of the various buildings referred to herein or in the act of 1898, and other buildings on or near Copley square, and the other facts material to the questions hereby raised which cannot be conveniently set out or shown herein.

12. The defendants further say that the information is not brought for the enforcement of any public charity or the restraint or prevention of any public nuisance; they deny that the Westminster Chambers constitutes, or that it will ever constitute, a public nuisance; and they say that no facts are disclosed in the information, and no facts exist, which require or authorize the attorney general to file or prosecute the information, or the court to entertain jurisdiction thereof, either on the ground of public charitable trust or public nuisance or any other legal ground.

13. The defendants further say that since the information was filed that part of their building which is above the height of 90 feet, being an architrave, frieze, and cornice of sculptured ornament, has been duly approved by the board of park commissioners of the city of Boston, as authorized by said act of 1898, as more fully set out in the first plea to the information, and that the building is in all respects a lawful structure.

14. The defendants further rely, by way of answer to the information, upon the pendency of the suit by the City of Boston against them under St. 1894, as more fully set out in the second plea to the information, the pendency of which suit is a bar to the maintenance of this information.

15. The defendants further say that St. 1898 upon which the information is based is an attempt to exercise the power of eminent domain, by taking certain interests or easements in the property of the defendants, and providing compensation therefor; that the va-

lidity of the taking depends upon the validity of the provisions for compensation; that unless the provisions for compensation are valid and effectual, the attempted taking is invalid, and the public has acquired no rights in or to the property of the defendants; that the statute does not require the city of Boston or any other authority to make any award to the defendants of damages or compensation for such taking, but provides compensation only by requiring the city to pay such damages as a jury may find to have been caused to the property of the defendants in an action to be brought by them; whereby it fails to make due provision for just compensation as required by due process of law, in violation of the constitution of this Commonwealth and of the fourteenth amendment of the Constitution of the United States; that the defendants have brought such action, and the same is now pending, but the city denies its obligation to pay any compensation or damages to the defendants; that the city had not at the time of the passage of the statute, nor at any time since, any moneys appro-
38 priated to this purpose, nor any specific power or authority to raise, appropriate, or pay money for such a purpose; that the power of the city to raise and appropriate money for any and all purposes is limited and restricted by the laws of the Commonwealth relating to municipal indebtedness; that the city denies, and the officers of the city who control its action in such a case deny, the obligation or power of the city to raise, appropriate, or pay money for such a purpose, and the power of the legislature to require the city so to do; and the city refuses to pay the defendants any damages or compensation whatever unless and until it is conclusively determined as against the city that the statute is constitutional and the requirement to pay damages valid and binding; and that the validity or sufficiency of the provisions for compensation, as against the city, cannot be determined in this proceeding, to which the city is not a party.

16. The defendants further say that their building was substantially completed at its present height, as described in paragraph 9 hereof, at the time of filing the information, and has never since been carried any higher, and the defendants have not and never have had any purpose to carry it higher unless and until it is authoritatively determined that they have a right so to do; that the interruption of the light and air of Copley square by that part of the building which is alleged to be in violation of the statute, if any, is imperceptible and inconsequential, and constitutes no substantial interference with any public rights in Copley square or otherwise; that there is no exigency which requires or justifies the prosecution of this information in advance of a conclusive determination of the rights of the public in the property of the defendants, if any, and the rights of the defendants to compensation therefor, which determination cannot be had in this proceeding; and that, in view of the premises, it is unjust and inequitable to further prosecute this information for the purpose of restraining the defendants from the use of their property, or of requiring them to demolish any part of their building; and that if the informant seeks to further prosecute the

same he should be required to join the City of Boston as a party thereto, in order that the rights of the public in the defendants' property, if any, and the rights of the defendants to compensation therefor, may be conclusively determined in this proceeding.

17. The defendants further say that the contract made between the defendants Williams and Ladd, trustees, and the defendant Westminster Construction Company, referred to in paragraph 3 hereof, was a contract in writing duly executed on or about September 1, 1897, whereby said company agreed to erect the Westminster Chambers building complete for the sum of $635,000; that if the legal effect of the statute of 1898 is to cut down the building from the height of 120 feet, or ten stories, as originally planned and contracted for, to the height of 90 feet, or eight stories, with the architrave, frieze, and cornice thereon, as hereinbefore described, the statute impaired and destroyed the value of such contract to said defendant company in and by a sum not less than $8000;
39 and if the legal effect of the statute is also to cut off the architrave, frieze, and cornice, the value of said contract to said defendant is thereby impaired and destroyed by a sum not less than $9200, unless the defendant trustees are legally liable to pay the full contract price thereunder notwithstanding the statute; that if they are so liable, the statute amounts to taking their property without just compensation as required by due process of law, in violation of the provisions of the constitution of Massachusetts and of the fourteenth amendment of the Constitution of the United States, and as against said defendant trustees impairs the obligation of said contract, in violation of the contract clause of the Constitution of the United States; and that if said defendant trustees, in view of the statute, are not legally liable to pay the full contract price under said contract, and if the statute does not provide full compensation for such impairment and loss, the effect of the statute is to take the property of said defendant company without just compensation as required by due process of law, in violation of the constitutional provisions hereinabove referred to, and as against said defendant company to impair the obligation of said contract in violation of the contract clause of the Constitution of the United States.

18. The defendants further say that the contract made between the defendant Westminster Construction Company and the defendants Woodbury & Leighton, referred to in paragraph 3 of the answer, was a contract in writing duly executed on or about September 1, 1897, whereby the defendants Woodbury & Leighton agreed to perform the whole work involved in the construction of the building, except the steel framing and fireproofing, for the sum of $398,700; that if the legal effect of the statute of 1898 is to cut down the building as aforesaid to the height of 90 feet with the architrave, frieze, and cornice thereon as aforesaid, the statute impaired and destroyed the value of said contract to said defendants in and by a sum not less than $7300; and if the legal effect of the statute is also to cut off the architrave, frieze, and cornice, the value of said contract to said defendants is thereby impaired and destroyed by a sum not less than $8380, unless the defendant company is

legally liable to pay the full contract price thereunder notwithstanding the statute; that if the defendant company is so liable, the effect of the statute is to take its property without just compensation as required by due process of law, in violation of the constitutional provisions hereinabove referred to, and as against said defendant company to impair the obligation of said contract, in violation of the contract clause of the Constitution of the United States; and that if said defendant company, in view of the statute, is not legally liable to pay the full contract price under said contract, and if the statute does not provide full compensation for such impairment and loss, the effect of the statute is to take the property of said defendants Woodbury & Leighton without just compensation as required by due process of law, in violation of the constitutional provisions hereinabove referred to, and as against said defendants to impair the obligation of said contract, in violation of the contract clause of the Constitution of the United States.

19. The defendants further say that the material for their building was produced for and adapted to a building of ten stories, of the height of 120 feet, as originally designed, and that much of it was heavier than would have been needed or produced for a building of the lesser height prescribed by the statute of 1898; and that the defendant Westminster Construction Company was obliged to incur, and incurred, additional cost and expense in the transportation and handling of such heavier material over that which would have been incurred if the material had originally been produced for and adapted to a building of such lesser height, in and by the sum of $365; and that said defendant was obliged to incur, and incurred, additional cost and expense in the actual reconstruction of said building necessitated by the statute, beyond the "cost or expense of any rearrangement of the design or construction" thereof, in and by the sum of $4023; and that unless the statute provides full compensation therefor its effect is to take the property of said defendant without just compensation as required by due process of law, in violation of the constitutional provisions hereinabove referred to.

20. The defendants are advised and allege that for the reasons hereinabove set forth, and for other reasons, the statute of 1898, upon which the information is founded, in its application to the defendants is in violation of articles I., X., XII., and XXX. of the declaration of rights, and of other provisions of the constitution of this Commonwealth, and is in violation of the second clause of section 1 of the fourteenth amendment, of the contract clause, and of other provisions of the Constitution of the United States; that it rests upon no lawful or proper ground of the exercise of the legislative powers therein attempted to be exercised, and that it is not a proper or valid exercise of any power of the legislature; that it is arbitrary, oppressive, discriminating, partial, and unequal; and that, as applied to the defendants, or to their land and building referred to in the bill, under and in view of the existing facts and circumstances, it is inoperative and ineffectual to sustain the information.

And the defendants deny every other allegation of the information not hereinabove admitted, denied, or otherwise answered.

HENRY B. WILLIAMS,
BABSON S. LADD, *Trustees.*
WOODBURY & LEIGHTON.
WESTMINSTER CONSTRUCTION CO.,
By A. E. PILLSBURY, *Solicitor and of Counsel.*

41 I certify that the demurrer contained in the foregoing answer is not intended for delay.

A. E. PILLSBURY.

42 Upon which demurrer, plea and answer is endorsed the following—

The within, embodying the original demurrer, plea and answer, with amendments added thereto, may be filed as the complete demurrer, plea, and answer of defendants.

ELDER, WAIT & WHITMAN.

Filed December 13, 1900.
Issue joined.

And on said thirteenth day of December, the following statement of agreed facts was filed, to wit:

43 *Agreed Facts.*

The subjoined statement of facts is agreed upon by the parties, subject to the opinion of the court as to the competency of any fact stated. The court may draw such inferences of fact from the facts agreed as a jury might draw therefrom. The statement shall not exclude consideration of any fact of which the court may properly take judicial notice, nor proof of further facts by either party.

The Art Museum was incorporated by chapter 4 of the Acts of 1870, and additional powers have been given to it by chapter 192 of the Acts of 1894 and by chapter 113 of the Acts of 1898. It is the owner of works of art of great value, estimated at $950,000, many of which are in their nature irreplaceable, and for the convenient and complete examination of which free access of light is essential. This property is not employed for private gain, but is resorted to by the public in large numbers for its entertainment, instruction, and education. The expenses of the corporation are met from public and private subscription, and from the income of funds received and held upon public charitable trusts.

The public library of the city of Boston is, by chapter 222 of the Acts of the Year 1880, open to all citizens of the Commonwealth free of charge, and contains books, manuscripts, and works of art of great value, estimated at $2,000,000, many of which are in their nature irreplaceable.

A building of the Institute of Technology, used by the mechanical, chemical, and architectural departments, adjoins the Westminster Chambers on Trinity place, being separated from it only by a narrow

passageway. This building is of red brick, six stories high, and interferes with the light of the Art Museum, and would interfere with the light of any building on the rear portion of the museum lot, with which the defendants' building does not interfere. The statutes of the Commonwealth relating to the Institute of Technology may be referred to.

44 *History of the Building.*

Prior to July 1, 1897, the land which forms the site of the Westminster Chambers, referred to in the information, was occupied by six dwelling-houses, with their appurtenances, belonging to five owners, who had arranged for the improvement of the property by the erection of a ten-story residential apartment house thereon. For this purpose the land was conveyed, by deed of July 1, 1897, to the defendants Williams and Ladd, as trustees for the owners, with provision for the construction of such a building by them or under their direction, and the issue of trust stock to the par value of $500,000, which was less than the owners' estimate of the value of the equity in the land and completed building, above a mortgage of $500,000, the actual cost of land and construction being more than $1,000,000, which stock was to be and was applied to paying the original owners for the land so far as not paid for in cash, and the balance toward payment of the contracts for the construction of the building. The land was conveyed by the owners to the trustees in consideration of the sum of $365,000, $56,600 of which was paid in the stock at par, and the balance in cash, the assessed value of the property at that time being $198,300. The present assessed value of the building and land is $816,000. At that time 150 shares of the stock were sold for cash at par, and in the fall of 1899, 2,000 shares were sold for cash at par. Contemporaneously, the owners and the contractors for the construction of the building, with the architect and George W. Arthur, formed the defendant corporation, the Westminster Construction Company, they being the members and stockholders thereof, for the purpose of having the building constructed by this company instead of by the trustees in person. A permit to construct the foundations of a ten-story apartment house, of the dimensions of 148½ feet on St. James avenue and 100 feet on Trinity place, was issued by the building department of the city of Boston July 16, and a permit for the erection of the building, of ten stories, of the height of 120 feet, including the architrave, frieze, and cornice thereon, as planned and designed, was issued by the department July 21, 1897. At that time and ever since the general limitation of the height of buildings in Boston was, by St. 1894, c. 443, sec. 9, 125 feet, or not exceeding two and one-half times the width of the widest street on which the building stands, which latter limitation would permit of a building more than 120 feet high upon this site.

There are several buildings in Boston built prior to the statute of 1894, exceeding 125 feet in height, and many others built since that statute, some before and some after the statute of 1898, of the height

of 125 feet, including an eleven-story hotel, the Lenox, of the height of 125 feet, at the corner of Exeter and Boylston streets, which breaks the sky-line of the public library viewed from the easterly part of Copley square.

The trustees made a written contract with the construction company to erect the building complete for the sum of $635,000.

45 The construction company made a written contract with the Fawcett Ventilated Fireproof Company of Philadelphia, Pa., for the steel framework and fireproofing of the entire building for the sum of $131,300; and with the defendants Woodbury & Leighton for the whole work involved in the construction of the building, apart from the contract of the Fawcett Company, for the sum of $398,700; and with an architect, to complete the plans and superintend the work, for the sum of $26,500. All these contracts were dated September 1, 1897, and were delivered and took effect on or about that date.

About the time the building was begun, an agitation was begun to prevent its erection to the projected height of the permit, and a letter was written in behalf of Trinity church to the construction company toward the end of September, inquiring on what terms the owners would reduce the height of the building, in reply to which terms were named which were unsatisfactory.

Under the permits aforesaid the work was begun, by demolition of the dwelling-houses standing upon the land, August 27, 1897, which demolition was completed by September 16, on which date the construction of the foundations of the new building was begun, which construction was completed before January 1, 1898, at a cost of about $30,760. The steel framework began to be delivered on the premises January 11, 1898. May 23, 1898, the date of the passage of the statute on which the information is based, the steel framework of the building was wholly erected to the height of seven stories above the basement, and about half a dozen steel beams, which had been temporarily put up in their original length, projected above a height of 100 feet, and the masonry walls of the building were completed to a point between the third and fourth stories, the construction of the upper part of the building having been suspended in accordance with the stipulation with the city hereinafter set forth. The state of the framework of the upper part of the building at this time is shown in the accompanying photograph marked H, which also shows a part of the Institute of Technology building hereinbefore referred to. At this time all the material for the construction of the entire building, except a part of the inside finish, all of which material was specially designed and produced for this building, and was adapted to no other, had been produced by the manufacturers in pursuance of the contracts, and the greater part of it had been delivered on the premises; and at this time the defendants had actually expended in the work, in addition to the $365,000 paid for the land, not less than $185,000, or a total of $550,000.

Under their contracts, and in partial payment for the execution thereof, the Westminster Construction Company agreed to take at

par so much of the trust stock as was not taken by the other contractors or by the original owners in part payment for their estates, and under this provision acquired 3869 shares, representing an interest of about $\frac{3}{4}$ in the ownership of the building and land. The defendants Woodbury & Leighton agreed to take at par and took 300 shares, representing an ownership of about $\frac{1}{32}$, and the Fawcett Company agreed to take at par and took 115 shares. The balance of the contract price, under each contract, was payable in cash. In the fall of 1899, the construction company, by reason of the effect of the statute of 1898 upon the market value of the trust stock, became unable to perform its contract with the trustees, and the defendants Woodbury & Leighton were compelled to assume and did assume its contract, with its benefits and obligations.

46

September 17, 1898, the date of the filing of this information, the exterior construction of the building was wholly completed, with the architrave, frieze, and cornice as herein below described, and the building was in all respects substantially completed except the inside finish and some work upon the roof which did not involve any addition to the height of the building, substantially the whole portion above the 90-foot line having been constructed after May 23, 1898. At this time the defendants had expended in the work not less than the sum of $435,000 in addition to the $365,000 paid for the land, or a total of $800,000. The cost of the land and the amount of the contracts for construction of the building as originally designed was $1,000,000. The building is designed for residential apartments of the best character; the framework is wholly of steel; the walls, floors, partitions, and staircases of brick, marble, or terra-cotta; it is of fireproof construction throughout; it is fitted with all modern appliances for comfort and safety, and the exterior is embellished with sculptured figures, balconies, and other ornamentation.

On the 29th day of January, 1898, the park commissioners of Boston wrote to the defendant trustees, claiming that their plans contemplated a violation of the restrictions imposed by chapter 313 of the Acts of 1896 as amended by chapter 379 of the Acts of 1897, which authorized the establishment of a building line on parkways, and limited the height of buildings facing upon such parkways to 70 feet; and on the 29th day of March, 1898, the City of Boston, at the request of persons opposed to the erection of this building, filed a bill in equity against these defendants, alleging that it was being erected in violation of section 1 of chapter 313 of the Acts of 1896. The defendants duly appeared, and the following stipulation was filed by counsel April 25, 1898:—

"It is hereby stipulated and agreed that the building being erected upon the lot of land described in said bill shall not be completed to a height exceeding seventy feet, nor any part thereof carried beyond the height at which it now is, until the present legislature has taken final action on the pending bills relating to height of buildings about Copley square, or until otherwise agreed or ordered by the court; the defendants not admitting, however, that there is now any power to limit the height of said building to seventy feet, or that

the plaintiff has any right to bring or maintain this bill, and this agreement being only provisional and temporary, to avoid
47 necessity of application for temporary injunction, and otherwise without prejudice to any rights; it being also agreed that the steel frame of one story of said building has been erected above the height of seventy feet by a misunderstanding of the defendants, their counsel having agreed with the counsel for the plaintiff at the time of filing the bill, that until further notice the building should not be erected above the height of seventy feet."

Upon the passage of the statute of 1898, and before going forward to complete the upper part of the building, the defendants, or their counsel, had numerous conferences with the mayor, corporation counsel, and city solicitor, and several with the park commissioners of the city of Boston, in which the plans for the building as originally designed were exhibited, and various methods of completing it in conformity to the statute were considered. Plans showing the proposed method of completing the building as eventually carried out were submitted by the defendants to the park commissioners, and by them referred to their consulting architect, an architect of distinction and experience, a professor in the Institute of Technology, which was one of the most active promoters of St. 1898, who advised them that, as he thought, the plans as presented contemplated a violation of law, and submitted sketches making the plans conform to law, as he thought, giving an opinion that the change, as suggested by him, would not injure the architectural effect of the original design. The plans, with the sketches and suggestions of change by the consulting architect, were then returned to the defendants by the park commissioners. The architect's suggestions were not adopted by the defendants. It was the opinion of the mayor and the law officers of the city, and of the defendants' counsel, that, in any view of the statute, the building could be lawfully completed at the height of eight stories, with the architrave, frieze, and cornice of sculptured ornaments thereon as originally designed, if such ornaments were approved by the park commissioners under the authority conferred by the statute. After examination of the plans by the commissioners, and a full explanation of this proposed method of completing the building, the mayor and law officers were given to understand that the sculptured ornaments, if so erected in accordance with the plans, would be approved, which understanding was communicated to the defendants. It was the opinion and belief of the city law officers, the mayor, the defendants' counsel, and the defendants, that such approval would make the structure lawful, in any view of the statute. After completion of the building in accordance with this arrangement, the park commissioners viewed it, and thereupon passed the following vote:—

48 "City of Boston.

"In board of park commissioners.

"Oct. 31, 1898.

"Voted, by virtue of and in the exercise of the power conferred upon this board by chapter 452 of the Acts of the Year 1898, that

the sculptured ornaments erected on the building situated at the corner of St. James avenue and Trinity place, known as the Westminster chambers, above the height of ninety feet, as shown in the plans thereof submitted to the board and in the building as now erected, be and the same are hereby approved."

The construction of the upper part of the building as thus completed is substantially as follows: The height of the walls to the highest point of the roof is 96 feet; the ceiling of the rooms of the upper (8th) story is a few inches above a horizontal line of the height of ninety feet; above these rooms there is an open-air space extending to the roof (which is flat, with a slight slope to carry off rainfall) a distance of about 4 feet at the highest point, measured on the inside of the outer walls of the building, and less than 2 feet at the lowest point, the walls being of an even height of 96 feet. The walls of the building fronting on St. James avenue and Trinity place, respectively, in the basement and first story are of granite and limestone, in the second story of ornamental terra-cotta, and above the second story of mottled Pompeian brick, of a light color, specially manufactured for this purpose, with terra-cotta balconies and ornamentation, and from and above a line of the height of about 88 feet 8 inches on the two street fronts, of sculptured terra-cotta ornaments, tied into and forming part of a wall, the rear portion of which is of brick, in which portion, at intervals of from 6 to 16 feet apart, are steel columns or angle irons, about four inches thick, connected near their top by two horizontal steel beams about four inches thick, all as shown on the cross-section sketch I, submitted as part hereof, constituting the architrave, frieze, and cornice of the building. On the two sides of the building not fronting on streets, one of which faces on a private passageway, the walls at a corresponding height are of plain brick.

If the sculptured ornaments, either alone or with the wall that supports them, or with any other support substituted for such wall, remain as they now are, no part of the building which is behind them occasions any additional interference with the light or air in Copley square, and no part of the building which is behind them can be seen from any part of the square, except the tops of the chimneys and the covering of the structure on the roof over the elevator shaft, commonly called the pent-house, which are constructed exactly as the building laws of the city of Boston require them to be; and these can be seen only from the extreme northwest corner of the square, diagonally opposite to and most distant from the
49 building. The building department of Boston has always construed the limitations of height of buildings to except these structures.

History of Copley Square.

The open space popularly known as Copley square consists on the northerly side of that part of Boylston street which lies between Clarendon and Dartmouth streets; on the westerly side of that part of Dartmouth street between Boylston street and Huntington avenue;

on the southerly side of that part of St. James avenue between Huntington avenue and Trinity place; on the easterly side of Trinity place, of Huntington avenue, which crosses the square diagonally, from its intersection with Boylston street at the northeast corner to its intersection with Dartmouth street at the southwest corner; and of two triangular pieces of vacant land, the larger enclosed by Boylston and Dartmouth streets and Huntington avenue, the smaller enclosed by Huntington avenue, St. James avenue, and Trinity place; all as shown on plans E and F submitted as part hereof. All these streets are public highways, upon the ordinary footing of such. From the easterly side of Trinity place to Clarendon street the distance, measured on St. James avenue, is 248 feet.

The Large Triangle.

The larger of the two triangular pieces of vacant land was acquired and is held by the city of Boston as follows:—

June 20, 1881, the board of aldermen passed the following order, approved June 25:—

"Ordered, that the park commissioners be requested to report to the city council the expense of laying out as public parks the lot of land on Dartmouth and Boylston Sts. in front of the Art Museum, and the lot of land at the junction of Huntington Ave. and Boylston St., and also the amount of betterments that can be assessed in case said lots are so laid out."

Upon this order the park commissioners reported September 19, 1881, giving an estimate of the cost of acquisition at $155,100, and amount of betterments $149,119, one-half of which would be chargeable to adjacent estates, which report was referred to the committee on public parks, and no further action was taken upon it.

On April 20, 1882, a petition was received from Henry P. Kidder and others, requesting that a public hearing be given upon the subject of laying out the larger lot as a public square. This petition was referred to the committee on public parks, who subsequently gave a public hearing, and made a report May 11, 1882, the substance of which is as follows:

50 "The lot of land in question is surrounded by some of the most costly and ornamental public buildings in the city, erected in a great measure by private munificence, and on one side of the square is situated the land recently given by the Commonwealth for the site of the new Public Library building. The hearing developed a willingness to subscribe liberally towards accomplishing the purpose, and Mr. Kidder, in the course of his remarks, proposed that the city should appropriate $100,000 towards the object, and that the balance of the amount required to purchase the land should be furnished by private subscription. That proposition met the views which the committee previously entertained, and they are unanimously of the opinion that the generous proposition and earnest desire of so large a number of heavy tax-payers should not be ignored, and that such a favorable opportunity for not only

beautifying the city, but also adding to the health and comfort of all classes of citizens, should not be lost. They therefore respectfully recommend the passage of the accompanying order."

"Ordered, that the city treasurer be and he hereby is authorized to borrow, under the direction of the committee on finance, and at such rate of interest as they may determine, the sum of $100,000, which sum is hereby made a special appropriation to cover the estimated expense of purchasing the land bounded by Boylston St., Huntington avenue and Dartmouth street, containing about 26,477 square feet, for a public park, to be known as the 'Church Green appropriation,' under the provisions of chapter 185 of the Acts of 1875, and to issue therefor bonds or certificates of indebtedness, to be denominated on their face 'Public park loans,' and made payable in thirty years from the date thereof; provided however that no expenditure shall be made unless said land be conveyed to the city for said sum within 30 days from the passage of this order."

This order was passed June 20, 1882. The excess of cost over $100,000 was raised by public subscription.

Subsequently, at the suggestion of the corporation counsel, in order to avoid any legal controversy over the title, this order was rescinded by the following order, approved July 7, 1882, the lot therein referred to being the larger triangle:—

"Ordered, that the city treasurer be and he is hereby authorized to borrow, under the direction of the committee on finance, and at such a rate of interest as they shall determine, the sum of $100,000, which sum is hereby made a special appropriation to cover the expense of acquiring the land bounded by Bolyston St. Huntington Ave. and Dartmouth St. for a public park, and the committee on public parks are hereby authorized to expend said sum in acquiring said land for said purposes in the name of the city, under the provisions of chapter 107 of the Acts of 1881, and of any other
51 laws relating thereto; provided that no expenditure shall be made unless said land be acquired as aforesaid within thirty days from the passage of this order; and provided further that bonds satisfactory to the corporation counsel be given for the payment of the taxes assessed upon said land the current year and the amount thereof shall have been determined. The order passed June 20, 1882, relating to the 'Church Green appropriation' is hereby rescinded."

Pursuant to this vote the larger triangle was conveyed to the city by four deeds, as follows:—

(1.) A deed of the trustees of the Museum of Fine Arts dated July 3, 1882, conveying the southwesterly apex of the triangle, bounded 60.2 feet on Huntington avenue, 28.19 feet on Dartmouth street, and on the north 53 feet on a passageway, the habendum clause containing these words: "To be used for the purpose of a public street or park of the said city."

(2.) A deed of the harbor and land commissioners dated June 30, 1882, releasing to the city the southerly half of a then existing passageway immediately north of and adjacent to the tract above described as conveyed by the trustees of the Art Museum, the strip of

land released being 12½ feet wide; this deed containing the following provision:

"This conveyance is made upon the condition that the said parcel shall forever be kept open as a public park by said city, and shall be subject to the limitations and stipulations relative to lands of the Commonwealth on the south side of Boylston street, and shall be reserved from sale forever; and upon further condition that the city of Boston shall acquire by purchase or otherwise the remainder of the trapezoid of land bounded by Dartmouth street, Boylston street and Huntington avenue, of which said parcel is a part, and shall appropriate it to the same purpose. In case said city shall appropriate said parcel of land hereby granted to any purpose foreign to that for which it is granted, then the Commonwealth, after due notice given, may enter upon said parcel and take possession thereof, and the right of said city of Boston to the right, occupation and control of said lot shall thereupon cease."

(3.) A deed of the commissioners dated July 13, 1882, conveying to the city the rectangular piece lying immediately north of and adjacent to the passageway the southerly half of which was conveyed by their former deed, bounded 125 feet on Dartmouth street and on the opposite (easterly) side, and 100 feet on Boylston street and on the opposite (southerly) side; together with the northerly half of the passageway lying between the larger tract conveyed and the southerly half of the passageway which was the subject of their earlier deed, this deed containing the "Back Bay restrictions," so called, as to the character of buildings, but no words of limitation to park or other uses. This tract had been bonded to Franklin Evans by the Commonwealth, and the city purchased the bond from the Evans estate, and the form of this deed was such as the bond called for.

52

(4.) A deed of the Massachusetts Institute of Technology dated July 21, 1882, expressed to be made "by virtue of chapter 107 of the Acts of the Legislature of said Commonwealth passed in the year 1881, and of every other power it hereto enabling," conveying to the city the remainder of the triangle lying easterly of and adjacent to the larger tract described in the last-named deed of the harbor commissioners, "being the parcel described in chapter 174 of the Acts of 1873." This deed contained no words of limitation to park or other uses.

These several parcels composing the large triangle are shown on plan G, submitted as part hereof.

August 14, 1882, the mayor informed the board of aldermen that "the lot of land on Boylston and Dartmouth Sts. lately owned by the Mass. Institute of Technology, Mrs. Evans and others has been bought in accordance with the proposition of the city council, and deeds thereof have been given to the city," and recommended "that the lot of land be graded and improved in conformity with an implied agreement with the parties, and that an appropriate name be given thereto." Referred to the joint committee on common and public grounds.

Subsequently, in February, 1883, this committee reported as follows:

"The joint standing committee on common and public grounds, to whom was referred among the unfinished business of last year the subject of naming the lot of land on Boylston and Dartmouth Sts., which was purchased last year for a public square, beg leave to report as follows:

"'The committee recommend that the square be named Copley square, in commemoration of John Singleton Copley, the distinguished artist, who was born in Boston July 3, 1737, and became eminent in his profession. The committee respectfully recommend the passage of the accompanying order.'

"Ordered, that the lot of land bounded by Huntington Ave., Dartmouth and Boylston Sts. purchased for a public square be and the same is hereby named Copley square."

This order was passed and approved February 21, 1883.

By order approved June 16, 1883, the committee on common and public grounds were authorized to expend $5000 in placing a suitable curbstone around Copley square.

53 By order approved June 7, 1884, the committee on common and public grounds were authorized to expend the balance of the appropriation for the curbstone around Copley square $1554.65, in improving the ground.

This larger triangle has never been taken, laid out, or otherwise dealt with by the board of park commissioners as or for a public park, and has never been controlled by them, but has always remained within the jurisdiction and control of the committee on common and public grounds of the city council, or the superintendent of public grounds.

The Small Triangle.

The smaller of the two triangular pieces of land enclosed by Huntington and St. James avenues and Trinity place, was acquired by the city of Boston as follows:

The following order was passed and approved January 2, 1885:

"Ordered, that the city auditor be authorized to transfer the sum of $30,000 from the reserved fund to a special appropriation to be called Trinity triangle, and the board of park commissioners are hereby authorized to expend said sum in acquiring the land bounded by Huntington Ave., St. James Ave. and Trinity place for a public park, provided that no expenditure shall be made unless said land be acquired as aforesaid within 60 days from the passage of this order."

January 24, 1885, the park commissioners passed the following vote:

"Whereas by an order of the city council, passed Jan. 2, 1885, the board was authorized to expend the sum of $30,000 in acquiring the land bounded by Huntington Ave. St. James Ave. and Trinity place for a public park, said land to be acquired within 60 days from the passage of the order which also provides a special ap-

propriation therefor to be called 'Trinity triangle' it is therefore hereby voted that there be purchased of Henry M. Whitney the said parcel of land bounded by Huntington Ave. St. James Ave. and Trinity place, and that there be paid to the said Henry M. Whitney the said sum of $30,000 upon his giving a deed for the same within 60 days satisfactory to the city solicitor containing the limitation that the said premises shall be used only for the purposes of a public park or street and that no building shall ever be erected or placed on said premises or any part thereof; and that the chairman sign a request on the auditor for a special draft in favor of said payment; said amount to be charged to the appropriation for Trinity triangle."

Pursuant to the foregoing vote the small triangle was conveyed to the city by deed of Henry M. Whitney, January 3, 1885, containing the following provision:

54 "This conveyance is made upon the conditions that the described premises shall be used only for the purposes of a public park or street of said city of Boston, and that no building shall ever be erected or placed on said premises or any part thereof."

The excess of cost above $30,000, amounting to over $40,000, was paid by public subscription, after public agitation to preserve the triangle from being built upon, to which subscription the defendant Williams contributed $1500 and the defendant Ladd $500.

In April, 1885, on recommendation of the committee on common and public grounds, to which the subject had been referred, the following orders were passed, approved April 21, 1885:—

"Ordered, that the name of Copley square be hereby made to include the parcel of land adjacent thereto recently purchased by the city and known as Trinity triangle.

"Ordered, that the parcel of land known as Trinity triangle be and hereby is placed in charge of the committee on common and public grounds."

This smaller triangle has never been taken, laid out, or otherwise dealt with by the board of park commissioners as or for a public park, and has always remained within the jurisdiction and control of the committee on common and public grounds of the city council or the superintendent of public grounds, under the foregoing vote (which has never been rescinded), except as stated below, namely, in or about March, 1898, and while the bills which resulted in the statute of 1898 were pending before the legislature, the city law department was asked by supporters of these bills to bring a bill in equity against the owners of the Westminster Chambers under an act relating to a building line and height of buildings on parkways, etc., St. 1896, c. 313, which bill was brought, as hereinabove set forth. For the purpose of furnishing some ground for this bill, the city law officer who brought it advised the park commissioners to make some expenditures upon the small triangle, to support a claim that it was a park. In consequence of this advice the park commission expended on the triangle $3.50 March 4, and $1.75 March 5, 1898, and $63.99 in 1899; and March 1, 1898, notified the superintendent of public grounds that the superintendent of the park

commission would take charge of Trinity triangle, and he has so done.

Each of the triangles consists physically of a piece of grass-covered ground, surrounded by a stone curbing. The large triangle has at times since the passage of St. 1898, been set with plants or flowers. Neither triangle is or has ever been furnished with seats or any other accommodation for public use, and the public has never been invited or permitted to actually occupy them for any purpose. No set-back line has ever been established under the statute of 1896 on or near Copley square or either of the streets on which the defendants' building abuts.

55 The Boston park act, St. 1875, c. 185, and any other acts applicable to parks in Boston, may be considered in the case.

History of the Statute of 1898.

An early feature of the movement for the restriction by law of the height of the defendants' building was the subjoined circular, the purpose of which was to call a public meeting, which was widely circulated among the inhabitants of Boston, more especially in the Back Bay district, about December 1, 1897, by a committee which was formed and held its first meeting about the middle of October:—

"A most important question now confronting the people of Boston is this: Shall all that has been done to make its chief square beautiful go for nothing? The proposed erection on the corner of St. James avenue and Trinity court of a building rising to the height of 125 feet means a serious disfigurement of Copley square. It negatives the efforts already made to give architectural and artistic beauty to the square, and it is bound to discourage those who are studying how best to develop its possibilities as the future centre of Boston.

"The undersigned, believing that the erection on Copley square of buildings rising to an extreme height would destroy the hopes long cherished by the public for the adornment of the square and convinced that a vigorous expression of public opinion will have influence in protecting the square in the future, respectfully request you to sign the enclosed card, and return it promptly to William Atkinson, No. 13 Exchange street.

FREDERICK O. PRINCE.
HOLKER ABBOTT.
B. C. CLARK.
EDWIN J. LEWIS, JR.
E. WINCHESTER DONALD.
R. D. ANDREWS.
WILLIAM ATKINSON.
BENJAMIN I. GILMAN.
CHARLES A. CUMMINGS."

The petition to the legislature, filed January 14, upon which the bill which afterward became, after various amendments, the statute

of 1898 was reported by the committee to which it was referred, was as follows :—

56 "To the honorable senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled :

The undersigned petitioners, citizens of the Commonwealth respectfully represent that there is necessity for legislation to prevent the construction of buildings on Copley square in the city of Boston and within five hundred feet of any line of said square to a height exceeding eighty feet from the street to the highest point of the roof of the building.

Wherefore they respectfully ask for such legislation.

J. H. BENTON, JR.
C. H. DALTON."

Accompanying the petition was the subjoined bill :

'An act relative to the height of buildings on or near Copley square in the city of Boston.

Be it enacted, etc.,

SECTION 1. No building or other structure shall be constructed on Copley square, or within five hundred feet from any line of said square, to a greater height than eighty feet from the sidewalk to the highest point of any part of the roof of such building.

SECT. 2. This act shall take effect upon its passage."

Several hearings were heard thereon in February and March, at which the defendants and the property-owners on the north side of the square, who, with one exception, opposed the bill, were represented by counsel. The petition was supported by the Museum of Fine Arts, the Massachusetts Institute of Technology, the trustees of the Boston public library, and by nearly three thousand petitioners from all parts of the Commonwealth, including the owners of the Ludlow, the Pierce building, and one owner of a dwelling on the north side of the square, nearly all of whom were upon a printed slip, being a copy of the above petition, which slips were issued and circulated by a voluntary committee in Boston. Testimony was offered before the committee, in behalf of the petitioners, relating to the great value of the art collections in the Art Museum and of the collections in the public library. There was also testimony to the effect that a ten-story building upon this site would interfere with the light of the rooms in the easterly part of the Art Museum, which is directly opposite the Westminster Chambers, on the westerly side of Trinity place, and would be detrimental to the architectural appearance and effect, and otherwise injurious to Trinity church, which is directly opposite the Westminster Chambers on the northerly side of St. James avenue, and that it would impair the general architectural appearance and effect of Copley square. Some of such evidence consisted of pictures purporting to show the
57 effect of a building of this height upon the architectural appearance of the square and the various buildings, especially

of the public library, which stands upon the west side of the square.

No evidence was introduced by either side bearing on the question whether Copley square is a public park. There was evidence that large sums of money had been expended, and gifts of land had been made by the State and city, and through private munificence, for the library, museum, institute, Natural History building, Normal art school, Horace Mann School for Deaf Mutes, about and in the immediate neighborhood of the square; and that such expenditures had very greatly enhanced the value of the property in the neighborhood of the square in the hands of private owners. Nothing was said in the hearings about the impairment of the light or interference with the air of Copley square considered as a public park, but the principal petitioner referred to St. 1896, c. 313, as an exercise of the undoubted right of the State to regulate the use of property, and stated openly and repeatedly that his principal purpose in filing and promoting the petition was the protection of the public library, of which he is one of the trustees.

The hearings on the part of the petitioners were conducted by persons especially interested in the Art Museum, the Institute of Technology, Trinity church, and by members of the board of trustees or other persons especially interested in the public library, or by counsel who voluntarily gave their services in behalf of them; and substantially all the witnesses in support of the petition were called by or through the agency of some of these persons or their counsel. The bill was advocated in the two branches of the legislature and in the public press, principally upon the ground that a ten-story building upon this site would impair the architectural symmetry, appearance, and effect of Copley square, and the particular buildings thereon, especially Trinity church and the public library.

The closing argument of the petitioner, Mr. Benton, contained these passages referring to the public library:

"The building was located upon a large public park, given in part by the Commonwealth without charge, and the remainder acquired by the city and by the contributions of public-spirited citizens of the city and of other portions of the Commonwealth, as and for a public park. This location was selected not only because it was beautiful in its surroundings by reason of the proximity of other public buildings of beautiful architecture, but because it was a safe location, and under the conditions which then existed, expected to continue safe from risk of fire or other casualties that might arise from the erection of tall buildings, tenement-houses and hotels in immediate proximity to the library building.

"The first question which you naturally ask is: 'What is Copley square, and why do all these petitioners ask for legislation to protect it?'

58 "Copley square is a public park composed of two triangular pieces of land between which Huntington avenue runs, and upon three sides of which Trinity church, the Museum of Fine Arts, and the Boston public library have been erected.

"Neither argument nor illustration are needed to make clear the imperative duty of the legislature to protect this square and the district about it from the irreparable injury which now threatens it. The question is plain and simple: Do you approve this threatened injury to this beautiful square, and all the precious interests upon and about it, or do you not? If one of these monstrous structures is put up it will be a constant menace to the safety of the treasures of art and of letters, and of all the beautiful and costly buildings about it. It will be a lasting shame and disgrace to the city and the Commonwealth. The legislature alone can prevent this. If it does not prevent it it will be because it approves it. If you, gentlemen, do not report legislation which will prevent it, it must be because you approve it. And if any of you should hereafter, as you doubtless all will, from time to time, go to this beautiful square to make the use, which as citizens you have a right to make, of the public institutions about it, and find upon it ten-story tenement houses, destroying its beauty and threatening the safety of all that the public own there, you will be able to say, 'I could have prevented that building from being there, but I approved it and therefore permitted it.'"

The closing argument of Samuel J. Elder, Esquire, the counsel for the Art Museum and Institute of Technology, contained this passage, as part of a discussion of the powers of the legislature and of cities and towns:

"Still again, has there ever been any doubt where one section of a city was more exposed to fire than another, or where a fire would entail greater and more irreparable injury in one section than in another, that the municipality itself, even without an act of legislature or the aid of the general court, might make restrictions and regulations which hamper the land-owner in every direction? Is there any doubt that he may be compelled to employ safeguards and appliances and costly construction which were not demanded of the man in the next block, or in the next ward?"

Also this passage later:

"I have also the honor to represent the trustees of the Museum of Fine Arts, the third largest land-owners in this section. They do not ask for this restriction on the ground merely of art or architecture or æstheticism. They have been charged by the State and the city with a great public trust. They received from the city land now worth a 59 million and a half of money. They have erected upon it, from gifts and bequests of public-spirited individuals and from the State, a building worth $300,000, and they have in their possession works of art, not merely worth in the vicinity of a million dollars, but many of them treasures irreplaceable at any price and the rest replaceable only at prohibitive valuations. The receptacle of these treasures stands thirty-six feet from the street line, and when constructed required no especial precaution against fire. The era of high buildings had not come. The structures of the day were accessible to the fire department, and in no reasonable contingency imperiled the safety of my client's trust. They find within the past six months a building proposed in close proximity to them one hun-

dred and twenty feet in height, but of alleged fireproof quality. What fireproof buildings are, you know. My friend Mr. Bartlett has described the crumbling away in an afternoon of a whole district of fireproof buildings in this city, and you have but to read the daily papers to learn how little the skill of man has been able to forestall and stay the fiercest of the elements. Steel structures are no exception.

"The question of fire is one of pre-eminent importance to this institution. The roof of the Museum of Arts is, for the lighting of its galleries, necessarily largely of glass. Fire in a building overtopping it by many stories is as certain, as things human can be, to result in disastrous consequences. Even a little smoke, a stream of water, the sifting down of cinders, the fall of a window sash may wipe out of existence much of what Massachusetts has done for art in America. In such a situation what was the duty of these trustees? What would have been your duty had you occupied their places? To sit calmly by and wait the event? Or was it their imperative duty to present their danger to the public from which they hold their trust and leave to that public, represented by you, to remove or authorize the continuance of the peril?

"Upon another ground the museum seeks this legislation. To an art museum light is as essential as shafting and machinery to a factory. One hundred and twenty feet of yellow masonry across the way will destroy one side of the building for the uses to which it is and was intended to be put. One of my friends on the other side has made merry with this argument. The diagrams introduced before you to illustrate the destroyed usefulness of one side of this building dealt principally with one gallery. From necessity some one was taken for illustration, and that the one most injured. How large is it? cries my friend; and when its size is roughly estimated, and, as it turns out, considerably underestimated, the shafts of their wit are aimed at the luckless Dutch room. His idea of art seems to be that of the western pork king, who boasted the yards of canvas he got for his money. Let me tell him that there are two canvases in the Dutch room, each less than two feet square, painted by Rembrandt's hand, worth $80,000 in the market, and irreplaceable if a coal of fire lights upon them. Last week four canvases were presented at the museum, trifling in their size, no one two feet square, but worth $150,000. Art is not measured in Boston or elsewhere by linear measure. The duty imposed upon these trustees has been performed. It rests with you to deal with the problem they have presented you."

Printed copies of these arguments were sent to all members of the legislature.

Proceedings Subsequent to St. 1898, *etc.*

Early in July, 1898, the trustees of the Museum of Fine Arts made an application to the attorney general to have a bill filed to restrain the construction of this building above the limitation of height imposed by the act of 1898. Various hearings were had before the attorney general, at which the application was opposed

by these defendants, but before a decision was reached by him the bill of the city of Boston below referred to was filed on July 25, 1898, in consequence of which the attorney general deferred his decision until the action of the city could be determined. The construction of the building proceeded, under the arrangement with the city authorities hereinabove set forth, and some time during the month of August the framework was constructed to its present height of 96 feet.

July 25, 1898, upon a written demand upon the mayor by counsel for the trustees of the Art Museum, the city of Boston brought a bill in equity in this court against all the defendants herein, under authority of St. 1894, c. 257 (which may be considered in the case), alleging that the defendants were then proceeding with the construction of the Westminster chambers, and "claim and assert the right to build the same to the full permitted height of 120 feet, notwithstanding the provisions of the act of 1898," and praying "that the defendants may be restrained by injunction from erecting or constructing said building in any different manner than may be permitted under said act of 1898;" to which bill the defendants demurred, on the ground of the unconstitutionality of the statute, and pleaded the approval of the architrave, frieze, and cornice by the board of park commissioners as hereinabove set forth. The arrangement between the owners and the city authorities for the completion of the upper part of the building, as hereinabove set forth, was regarded and treated by the city as a satisfactory adjustment of such suit for injunction between the city of Boston and the defendants, subject to the constitutionality of the statute and its validity to yield compensation to the defendants or any rights or interests in their estate thereby taken, the city officers, the defendants' counsel, and the defendants believing that the legal remedy for the enforcement of the statute of 1898 was in the city of Boston under the aforesaid statute of 1894, and that the arrangement for
61 the completion of the building, with the approval of the park commissioners, as hereinabove set forth, was permitted by the statute of 1898 if constitutional, and made the structure lawful. This suit is pending, but has been no further prosecuted, for the reasons that this arrangement was satisfactory to the city authorities; that in the opinion of the city law officers the statute of 1898 is unconstitutional; that if constitutional, the approval of the park commissioners made the building lawful; and that the aforesaid defences interposed by the defendants to the city's bill are a valid defence thereto. No actual application for an injunction has ever been made on this bill.

The damages occasioned the defendants by the statute of 1898, if valid, are computed by them to be a sum exceeding $300,000. Some of the elements of damage claimed by the defendants, in addition to the loss of the ninth and tenth stories, are as follows:

As the material for the building was produced for and adapted to a ten-story building 120 feet high, much of it was heavier than would have been needed or produced for a building of the lesser height prescribed by the statute, and the defendant Westminster

Construction Company necessarily incurred additional cost and expense in the transportation and handling of such heavier material above that which would have been incurred if the material had originally been produced for and adapted to a building of the statutory height, in and by the sum of about $365. Said defendant was also obliged to incur cost and expense in what it claims to have been actual reconstruction of the building, made necessary by the statute, as distinguished from the cost of "rearrangement of the design or construction thereof," namely, for recutting, punching, splicing, and riveting steel-work, and transporting the same to and from the mills, and in reconstructing floors made necessary by rearranging the position of certain balconies, which could not be placed upon an eight-story building as they were to be placed upon the ten-story building originally projected, amounting to about $4023.

The defendants also offer to prove the following facts, which may be taken subject to competency, as though testified to without contradiction:—

If the legal effect of the statute is to reduce the building from the projected height of 120 feet to its height as now actually constructed, the aforesaid contract of the defendant Westminster Construction Company with the trustees was thereby made less profitable, and its value to said defendant was thereby impaired, by an amount not less than $8000 and the aforesaid contract of the defendants Woodbury & Leighton was thereby made less profitable, and its value to said defendants was thereby impaired, by an amount not less than $7300. If the legal effect of the statute is to reduce the building from the projected height of 120 to the extreme height of 90 feet, without the sculptured ornaments or any other construction above the 90-feet line, the loss of profits and impairment of value
62 of the contract of the construction company is not less than $9200, and of the contract of Woodbury & Leighton not less than $8380.

February 28, 1899, the defendants herein, and the Fawcett Ventilated Fireproof Building Company above named, brought proceedings against the City of Boston under the statute of 1898 for the compensation due and damages occasioned them by the provisions of said statute, if constitutional.

The City of Boston answered in court a general denial, and its officers further deny any liability to the defendants; deny that the statute of 1898 imposes upon the city any valid obligation to pay them compensation or damages; deny the power of the legislature to require the city to pay them compensation or damages in such a case; and refuse to pay them any compensation or damages whatever unless and until it is finally and conclusively determined in said proceedings against the city that the city is liable for such compensation and damages. This case is pending, and has not been marked for trial by either party. The city of Boston had not at the time of the passage of the statute of 1898, and has never since had, any moneys specially appropriated to any such purpose as that prescribed by the damage clauses of this statute, nor any express statutory power or authority to raise, appropriate, or pay money for

such a purpose. The power of the city to raise and appropriate money for any and all purposes is limited and restricted by the laws of the Commonwealth relating to municipal indebtedness applicable to said city (which statutes may be considered in the case), especially chapter 29 of the Public Statutes, with its amendments, and chapter 399 of the Acts of the Year 1900.

The defendants' building has never been carried any higher since its completion as hereinabove described in September, 1898, and the defendants have never made any attempt or entertained any purpose to carry it higher unless and until it is authoritatively determined that they have a right so to do.

At some time in or about the year 1899 the trustees of the Museum of Fine Arts (originally the relators herein, who in January, 1900, were stricken out as such on motion of their counsel prosecuting the information) determined to remove the Art Museum from its present site on Copley square, as hereinabove set forth, and in October, 1899, obtained from the city of Boston a release of certain restrictions theretofore imposed upon their Copley Square estate, limiting it to use for the purposes of the fine arts, the removal of which restrictions permits them to use or sell the land for miscellaneous purposes.

Buildings on and about Copley Square.

At the time of the passage of the statute of 1898 the defendants' building was the only building "now being built" (St. 1898,
63 sec. 1), and the only building "the construction whereof was begun but not completed before the fourteenth day of January in the current year" (section 3) upon any of the lands to which the statute applies. The defendants' building is upon a portion of the first parcel of land described in the statute, namely, "land abutting on St. James avenue between Clarendon street and Dartmouth street," being upon the south side of St. James avenue, upon the corner formed by that avenue and Trinity place, its northwesterly corner "cornering" upon the southeasterly corner of the open space popularly known as Copley square, as more fully shown in the plans E and F submitted as part hereof. Next easterly of the defendants' building, and also upon "land abutting on St. James avenue," is the Ludlow, a six-story apartment house. The defendants' land is the only land to which the statute applies which was not occupied by a completed building at the date of the statute. Of the five other parcels of land about Copley square to which alone the limitation of 90 feet applies, one is occupied by Trinity church, which stands on the easterly side of the square, directly north of the defendants' building on the opposite side of St. James avenue; is a building of dignified architecture, generally considered the finest church, and one of the finest specimens of architecture, in Boston, built in the years 1873–1876. Its cost was approximately $515,000 above the land; assessed value of the estate May 1, 1897, $1,000,000. Its ground dimensions are approximately 175 x 120 feet. It is surmounted by three towers, the large central tower being about 56½ feet square, of a height of 181 feet to top of peak and 222 feet 8

inches to top of finial; the two smaller of the height of 108 feet 10 inches. The Art Museum stands upon "land abutting upon St. James avenue between Clarendon street and Dartmouth street" on the south side of the square, next westerly of and on the opposite side of Trinity place from the defendants' building; is of the ground area of 32,940 feet, of the height of 81 feet to the ridge of the pitch roof, and was built in or about 1873–1876. Its cost was approximately $548,000 above the land; assessed value 1897, $1,112,000. The Pierce building named in the statute stands at the southwesterly corner of the square, its northeasterly corner "cornering" upon that corner of the square; is approximately of the dimensions of 119 x 135 feet, of the height of 116 feet to the ridge of the pitch roof, was built in 1887–1889, at a cost of about $285,000 above the land; assessed, 1897, at $451,000; belongs to private owners, being occupied partly for public and partly for commercial purposes, and, with the Ludlow before referred to, is the only building upon either of the parcels of land described in the statute to which the 90-feet limitation applies, or on the easterly, southerly, or westerly sides of the square, which is not wholly of a public character. The Boston Public Library building occupies the whole westerly side of the square between Dartmouth street and Huntington avenue, was built in 1892–1894, at a cost approximately of $2,000,000 above the land; assessed in 1897 at $2,650,000; is of the dimensions of 225 x 227 feet, and of the height of 92 feet to the ridge of the pitch roof. The New Old South church, standing at the northwesterly corner of the
64 square on the northerly side of Boylston street at the corner of Dartmouth street, is one of the most elaborate and expensive church buildings in the city, was built in 1875–1876; has cost approximately $500,000 above the land; assessed in 1897 at $543,000; is of the dimensions approximately of 137 x 89 feet, and is surmounted by a tower of the dimensions of 23 x 28 feet, and of the extreme height of 223 feet. All the buildings above described except the Westminster, the Ludlow, and the Pierce building are exempt from taxation. The buildings upon the "land or lands abutting on Boylston street between Dartmouth street and Clarendon street," form the northerly side of the square, and, with the exception of the Second Church and the Chauncy Hall School building, are dwelling-houses and apartment houses in private ownership, the highest, two apartment houses, at the corner of Boylston and Clarendon streets, being from 80 to 90 feet high, all the other buildings on the north side of the square being of much less height. The size, character, appearance, and mutual relations of the various buildings surrounding the square are further shown by the plans and photograph K submitted as part hereof. Since the erection of the public buildings above described, Copley square has been generally considered the most attractive and ornamental public square of the city, and these buildings, especially Trinity church, the public library, and the Old South church, the most attractive and elaborate specimens of its architecture.

The estates abutting upon Copley square which are devoted to public uses have an area of 273,687 square feet, while the estates de-

voted to private or profitable uses upon the square have an area of only 76,537 square feet. In 1897 the assessed value of land devoted to private uses was $1,008,900; the assessed value of land devoted to public uses $3,411,423; the assessed value of the buildings devoted to private uses $699,300; and the assessed value of the buildings devoted to public uses $3,639,000. These figures, with others of similar character, were presented to the legislature of 1898.

The defendants' building as originally designed, of the height of 120 feet, would in fact have interfered with the light of the rooms in the easteriy end of the Art Museum, and with the architectural appearance and effect of Trinity church, and of the square as a whole, and with the light of the church, all the windows of which on the side toward the defendants' building are of stained glass. As actually constructed, that part of the building which is alleged to be in violation of law (the part above the 90-foot line) occasions no interruption of the light of the Art Museum or of Trinity church, or of the light or air of Copley square perceptible to ordinary observation beyond that which is occasioned by the building up to the 90-foot line, and no impairment of the architectural appearance or effect of the church or the square beyond that which would be occasioned by the building if it were cut off at the 90-foot line. The proportions and architectural appearance and effect of this building are improved by the architrave, frieze, and cornice, and would be impaired by now cutting it off at the 90-foot line, if nothing more were done to it, and the building, if left in this condition, would also impair the appearance of the square.

A building of the extreme lawful height of 125 feet on that part of the "land abutting on St. James avenue between Clarendon street and Dartmouth street" (St. 1898, sec. 1) easterly of the Westminster and farthest from Copley square, and any such building on any land four or five hundred feet distant from the square in any direction, would, from some points of view in and about the square, break the sky-line of Trinity church, the Art Museum or the public library, and impair to some extent the architectural appearance and effect of these buildings and of the square as a whole.

The following facts are ascertained by expert mathematical and astronomical computation:—

On the 21st day of June, when the sun is at its highest altitude, at 10 o'clock a. m., the shadow of the Westminster Chambers as actually constructed and completed, as cast by the sun in clear weather, does not reach or touch either of the triangles constituting Copley square; that part of it nearest the small triangle falls upon St. James avenue and Trinity place immediately contiguous to the northwesterly corner of the building, not extending across the avenue. At this time no part of the shadow of this building falls upon any other part of the entire open space popularly known as Copley square.

At this time the shadow of the building ceases about 11 a. m. to fall upon any part of the open space popularly known as Copley

square; and from that hour until sunset the shadow is constantly receding from it.

At this time, if the building were 120 feet high, its shadow would touch the sidewalk at the extreme southeasterly corner of the small triangle, not approaching within 180 feet of the nearest part of the large triangle, and would pass off the sidewalk within half an hour, and off the square within an hour.

At this time, if the building were of the extreme height of 90 feet, the shadow would fall upon a portion of St. James avenue near the southeasterly corner of the small triangle, and would pass off the square within an hour.

March 21 and September 21, when the sun is at its medium altitude, at 10 o'clock a. m. the shadow of the building as constructed falls upon the extreme easterly edge of the smaller triangle, to the width of about 1 foot, for a distance of about 30 feet from the southeasterly corner of the triangle, running north, and thence northerly for a distance of about 18 feet the shadow upon the easterly edge of the triangle is of a width varying from about 1 foot to about 5 feet. The shadow does not approach within 135 feet of any part of the large triangle.

At this time, if the building were 120 feet high, the shadow on the easterly edge of the triangle would be about 10 feet wide
66 for a distance of about 60 feet northerly from the southeasterly corner, and from 10 to 15 feet wide for the next 18 feet. No part of the shadow would approach within 110 feet of the large triangle. Within half an hour this shadow would have passed off the triangle, and by 11 a. m. would have passed entirely off the square.

At this time the shadow which would be cast by the building if of the extreme height of 90 feet falls upon the small triangle at its easterly edge, about 25 feet north of the southeasterly corner, for a distance of about 14 feet and of a width of about 3 feet.

At or about 11 a. m. on these dates the shadow of the building as constructed, and the shadow if it were 120 feet high, or if it were but 90 feet high, ceases to fall upon any part of the open space popularly known as Copley square, and from that hour the shadow is constantly receding from it.

At this time the shadow cast by Trinity church extends entirely across Huntington avenue and nearly one-third across Boylston street in and near the northeasterly corner of the square, and would remain there for several hours, and the shadow cast by the Art Museum extends entirely across St. James avenue and touches the sidewalk on the opposite side.

The foregoing facts more fully appear by the plan A submitted as part hereof; and the shadows of March 21 and September 21, with the shadows cast upon the square by Trinity church and the Art Museum at the same time, more fully appear upon the plan B, herewith produced as part hereof.

On November 6 and February 6 (the medium altitude of the sun between September 21 and December 21, and between December 21 and March 21), at 10 o'clock a. m., the shadow of the Westminster

Chambers as constructed falls upon the extreme easterly edge of Trinity place between St. James and Huntington avenues, of a width varying from 4 to 8½ feet, and passes off the square within fifteen minutes.

At the same time, if the building were 120 feet high, its shadow would fall upon the easterly side of Trinity place, of a width varying from zero to 11 feet, and upon a small portion of Huntington avenue, as indicated by the black dotted line on plan C, and passes entirely off the square within fifteen minutes.

At the same time the shadow of Trinity church falls entirely across Huntington avenue and Boylston street in and near the northeasterly corner of the square, and across the set-back space on the northerly side of Boylston street, touching the buildings on the northerly side thereof, which shadow will not pass off the square for several hours.

At the same time the shadow of the Art Museum building extends entirely across St. James avenue in front of it, and nearly across Huntington avenue, and covers the greater part of the westerly half of the small triangle. After 10 a. m. the shadow cast by the Art Museum upon the small triangle moves easterly and
67 continues to fall upon some part of the triangle until near sunset, falling upon Trinity place at or before the time when it passes off the triangle.

During some part of every day of the year between 9 a. m. and 4 p. m., except at the highest altitude of the sun in June and July, the Art Museum building casts a shadow upon St. James avenue and Huntington avenue, in front of it, varying in width from a shadow which extends entirely across St. James avenue to one which infringes but little upon it, according to the season and the elevation of the sun. The shadows of the Westminster Chambers, Trinity church, and the Art Museum, respectively, of November 6, at 10 a. m. are more fully shown upon the plan C submitted as part hereof.

The shadows cast October 18, at 10 a. m., by the Westminster upon the easterly edge of Trinity place, by Trinity church across Huntington avenue and upon Boylston street, and by the Art Museum across St. James avenue and upon the small triangle, as taken from actual observation upon the ground, are approximately shown upon the plan D submitted as part hereof.

Plan E, submitted as part hereof, shows Copley square, with the triangles, the streets, buildings, and surroundings between Clarendon street and Exeter street, upon a scale of 40 feet to 1 inch.

Plan F, submitted as part hereof, is the same as plan E, drawn upon the smaller scale of 80 feet to 1 inch.

H. M. KNOWLTON,
Attorney General,
By his attorneys, ELDER, WAIT & WHITMAN.
A. E. PILLSBURY,
For the Defendants.

Filed December 13, 1900.

(The plans and photographs submitted,—A–K.—as parts hereof,—on account of their shape and size are not annexed hereto, but are in a separate package, accompanying.)

67*a* Under the stipulation of the parties in said case—of which the following is a copy the originals of said plans and photographs are sent to the Supreme Court of the United States in a separate package accompanying said writ of error.—

Attest: JOHN NOBLE, *Clerk.*

67*b* John Noble, Esq., clerk supreme judicial court, Suffolk Co.:

The plans and photographs referred to in the agreed facts in the case of Hosea M. Knowlton, attorney general *v.* Henry B. Williams, *et als.*, may be transmitted to the clerk of the Supreme Court of the United States, with the record in Henry B. Williams, *et als.*, plaintiffs in error, *v.* Hosea M. Knowlton, attorney general, defendant in error.

FREDERICK H. NASH,
Assistant Attorney General.
A. E. PILLSBURY,
For the Pl'ffs in Error.

Filed June 5, 1901.

68 And on the eighteenth day of said December this cause was reserved for the consideration of the full court upon the report of the justice who presided at the hearing,

And afterwards, to wit, on the thirteenth day of March, A. D. 1901, it was ordered by the supreme judicial court for the Commonwealth, by its rescript, as follows, to wit:

69 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, March, 1901.

In the case of—

HOSEA M. KNOWLTON, Attorney General,
vs.
HENRY BIGELOW WILLIAMS ET AL.

pending in the supreme judicial court for the county of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; and file a decree as follows, viz:

By the court,

HENRY A. CLAPP, *Clerk.*

March 13, 1901.

70 *Decree.*

This case came on to be heard and was argued by counsel and thereupon on consideration thereof it is ordered adjudged and de-

creed as follows: The defendants Williams & Ayer, trustees of the Westminster Chambers Trust, so called, and each of them, and their servants and agents are enjoined and restrained from maintaining the building mentioned in the information and known as Westminster Chambers, after the first day of October next, above the height of ninety feet, and from hereafter constructing or erecting it above that height, and from maintaining it above that height if newly constructed; without prejudice however to their right under the statute to maintain or erect and maintain on said building above the height of ninety feet such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may hereafter approve; and the said Williams & Ayer trustees are commanded and directed on or before the first day of October next to take down and remove those parts of the walls of said building which are above the height of ninety
71 feet, and such other parts of said building as are above that height, this is without prejudice however to their right under the statute to erect and maintain such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may hereafter approve; and the plaintiff shall recover his costs of these defendants. The other defendants will take no costs.

72 And said final decree of the full court was thereupon entered, on said thirteenth day of March, A. D. 1901.

[redacted] which promises we have held good by

[redacted] JOHN NOBLE, [redacted]

74 UNITED STATES OF AMERICA, }
State of Massachusetts, } *ss:*

To the honorable the justices of the supreme judicial court:

Your petitioners Henry Bigelow Williams and Charles F. Ayer, trustees, both of Boston, in the county of Suffolk, in the State of Massachusetts, show unto your honors that heretofore, to wit, on the thirteenth day of March A. D. 1901, at Boston, in the said county of Suffolk in said State of Massachusetts, upon an information in equity in said supreme judicial court in said county, in which Hosea M. Knowlton, attorney general of the Commonwealth of Massachusetts was plaintiff, and your petitioners were defendants, a final judgment and decree was rendered against your petitioners in said court within and for the county of Suffolk, in said State, being the highest court of law or equity of the said State in which a decision could be had in said suit. And your petitioners say that in the trial of said case there was drawn in question the validity of a treaty

upon the pleadings, th
defendants' motion to have the city of Boston made a party, and th
appeal from the overruling thereof, and the agreed facts

creed as follows: The defendants Williams & Ayer, trustees of the Westminster Chambers Trust, so called, and each of them, and their servants and agents are enjoined and restrained from maintaining the building mentioned in the information and known as Westminster Chambers, after the first day of October next, above the height of ninety feet, and from hereafter constructing or erecting it above that height, and from maintaining it above that height if newly constructed; without prejudice however to their right under the statute to maintain or erect and maintain on said building above the height of ninety feet such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may hereafter approve; and the said Williams & Ayer trustees are commanded and directed on or before the first day of October next to take down and remove those parts of the walls of said building which are above the height of ninety
71 feet, and such other parts of said building as are above that height, this is without prejudice however to their right under the statute to erect and maintain such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may hereafter approve; and the plaintiff shall recover his costs of these defendants. The other defendants will take no costs.

72 And said final decree of the full court was thereupon entered, on said thirteenth day of March, A. D. 1901.

73 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness, Oliver Wendell Holmes, Esquire, chief justice of our said supreme judicial court, at Boston in said county, this
[SEAL.] twentieth day of May, in the year of our Lord nineteen hundred and one.

JOHN NOBLE, *Clerk.*

74 UNITED STATES OF AMERICA, }
State of Massachusetts, } *ss:*

To the honorable the justices of the supreme judicial court:

Your petitioners Henry Bigelow Williams and Charles F. Ayer, trustees, both of Boston, in the county of Suffolk, in the State of Massachusetts, show unto your honors that heretofore, to wit, on the thirteenth day of March A. D. 1901, at Boston, in the said county of Suffolk in said State of Massachusetts, upon an information in equity in said supreme judicial court in said county, in which Hosea M. Knowlton, attorney general of the Commonwealth of Massachusetts was plaintiff, and your petitioners were defendants, a final judgment and decree was rendered against your petitioners in said court within and for the county of Suffolk, in said State, being the highest court of law or equity of the said State in which a decision could be had in said suit. And your petitioners say that in the trial of said case there was drawn in question the validity of a treaty

or statute of, or an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute of, and authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, and laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution, and of a treaty, and statute of, and commission held under, the United States, and the decision was against the title, right, privilege, and exemption, specially set up and claimed under such clause of the said Constitution, treaty, statute and commission, and a manifest error hath happened to the great damage of your petitioners, as appears by the assignments of error hereto annexed, in a sum exceeding five thousand dollars exclusive of interest or costs.

Wherefore your petitioners pray that a writ of error to the Supreme Court of the United States may issue in due form of law, and they will ever pray, &c.

HENRY BIGELOW WILLIAMS,
CHARLES F. AYER, *Trustees*,
By A. E. PILLSBURY, *Their Sol'r.*

75 HENRY BIGELOW WILLIAMS ET AL., Trustees, Plaintiffs in Error,
v.
HOSEA M. KNOWLTON, Attorney General, Defendant in Error.

Assignment of Errors.

Henry Bigelow Williams and Charles F. Ayer, trustees, both of Boston in the county of Suffolk in the State of Massachusetts, defendants in the cause lately pending in the supreme judicial court of said Commonwealth, entitled Hosea M. Knowlton, attorney general, plaintiff, against Henry Bigelow Williams and others, defendants, wherein was drawn in question the validity of a statute of Massachusetts, being chapter 452 of the Acts of the Year 1898, on the ground that it is repugnant to the due process and equality clauses of the 14th amendment, and to the contract clause, of the Constitution of the United States, being aggrieved by the rulings, final judgment and decree of said court in said cause, which said rulings, final judgment and decree are in favor of the validity of said statute and are in derogation of the rights of the defendants under the aforesaid provisions of the Constitution of the United States, hereby assign the following errors in said rulings, final judgment and decree, namely:—

1. The court erred in enjoining and restraining the defendants from maintaining the building mentioned in the information and known as the Westminster Chambers, after the first day of October next, above the height of ninety feet, and from hereafter constructing or erecting it above that height; and in commanding and direct-

ing the defendants, on or before the first day of October next,
76 to take down and remove those parts of the walls of said building which are above the height of ninety feet, and such other parts of said building as are above that height.

2. The court erred in ruling and holding that said Massachusetts statute of 1898, chapter 452, is not in conflict with the clause of the 14th amendment of the Constitution of the United States forbidding any State to deprive any person of property without due process of law.

3. The court erred in ruling and holding that said statute does not deprive the defendants of their property without due process of law, in violation of the 14th amendment of the Constitution of the United States.

4. The court erred in ruling and holding that said statute makes due provision for just compensation for the property of the defendants thereby taken, as required by due process of law under the 14th amendment aforesaid.

5. The court erred in ruling and holding that no provision for an award of damages to the defendants for their property taken by said statute without an action brought by the defendants therefor, is essential to due process of law under the 14th amendment aforesaid.

6. The court erred in ruling and holding that the requirement of said statute that the city of Boston shall pay damages to the defendants for their property thereby taken is sufficient provision for just compensation to the defendants, as required by due process of law under the 14th amendment aforesaid.

7. The court erred in ruling and holding that the use to which the defendants' property is taken by said statute is such a public use as is essential to due process of law under the 14 amend-
77 ment aforesaid.

8. The court erred in ruling and holding that section 3 of said statute, in attempting to specify, define and limit the damages and the elements of damage for which the defendants may recover compensation thereunder, is consistent with due process of law, as required by the 14th amendment aforesaid, and is not in conflict with said clause of said amendment.

9. The court erred in ruling and holding that said statute is not in conflict with the clause of said 14th amendment forbidding any State to deny to any person within its jurisdiction the equal protection of the laws.

10. The court erred in ruling and holding that said statute does not deny to the defendants the equal protection of the laws, as required by the 14th amendment aforesaid.

11. The court erred in ruling and holding that said statute does not impair the obligation of the defendants' contract of September 1, 1897, with the Westminster Construction Company, set out in their answer and in the agreed statement of facts of record in said cause, in violation of the contract clause of the Constitution of the United States.

12. The court erred in ruling and holding that said statute pro-

vides just compensation, as required by due process of law under the 14th amendment aforesaid, for the impairment in value of their contract aforesaid, set out in their answer and in the agreed statement of facts of record in said cause, and so does not impair the obligation of said contract, in violation of the contract clause of the Constitution of the United States.

HENRY BIGELOW WILLIAMS,
CHARLES F. AYER, *Trustees*,
By A. E. PILLSBURY, *Sol'r.*

Filed May 16, 1901.

78 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *May* 20, 1901.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Attorney General *vs.* Henry B. Williams & others decided on the 30th day of October, 1899.

HENRY W. SWIFT,
Reporter of Decisions.

79 KNOWLTON, *J.*:

This is an information by the attorney general to prevent the erection and maintenance of that portion of a building on Copley square in the city of Boston which is above the limit of height prescribed by St. 1898, c. 452. Section 1 of this statute is as follows: "Any building now being built or hereafter to be built, rebuilt, or altered in the city of Boston upon any land abutting on St. James avenue between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce building, so called, or upon land abutting on Dartmouth street now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street now occupied by the new Old South Church building, may be completed, built, rebuilt, or altered to the height of
80 ninety feet and no more; and upon any land or lands abutting on Boylston street between Dartmouth street and Clarendon street may be completed, built, rebuilt, or altered to the height of one hundred feet and no more; provided, however, that there may be erected on any such building above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of said city may approve." Section 2 repeals St. 1896, c. 313, and St. 1897, c. 379, so far as they limit the height of buildings erected along the line of streets, parkways, or boulevards bordering on public parks. Section 3 provides for the payment of damages to any person owning or having an interest in an uncompleted building begun before the fourteenth day of January, 1898, which is affected by the act, and section 4 provides for compensation to all persons sustaining damages to their property by reason of the limitation of the height of buildings prescribed by the act. The case is reported upon the information, demurrer, pleas, and certain facts found at the hearing on the pleas.

The first question raised by the report is whether the statute is constitutional. The streets mentioned in the statute are adjacent to Copley square. On the case as now presented we must assume that Copley square, in the language of the information, "is an open square and a public park intended for the use, benefit, and
81 health of the public, and is surrounded by buildings devoted to religious, charitable, and educational purposes, some of which contain books, manuscripts, and works of art of great value, many of which are in their nature irreplaceable." Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments in the exercise of the police power, for the safety, comfort, and convenience of the people and for the benefit of property-owners generally. The right to make such regulations is too well established to be questioned. *Watertown v. Mayo*, 109 Mass. 315. *Salem v. Maynes*, 123 Mass. 372. *Sawyer v. Davis*, 136 Mass. 239. See *Talbot v. Hudson*, 16 Gray, 417. In view of the kind of buildings erected on the streets about Copley square and the uses to which some of the buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed. But it differs from most statutes relative to this subject in providing compensation to persons injured in their property by the limitations which it creates. In this respect it conforms to the constitutional requirements for the taking of property by the right of eminent domain. Looking to all its provisions in connection with the place to which they apply, it seems to have been intended as a taking of rights in property
82 for the benefit of the public who use Copley square. It adds to the public park rights in light and air and in the view over adjacent land above the line to which buildings may be erected. These rights are in the nature of an easement created by the statute and annexed to the park. Ample provision is made for compensation to the owners of the servient estates. In all respects the statute is in accordance with the laws regulating the taking of property by right of eminent domain, if the legislature properly could determine that the preservation of the park in this particular was for a public use. The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement. Many things which a century ago were luxuries or were altogether unknown, have now become necessaries.

It is only within a few years that lands have been taken in this country for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised. *Foster v. Park Commissioners*, 133 Mass. 321. *Shoemaker v. United States*, 147 U. S. 282. Many statutes have been passed in this Commonwealth allowing taxation for purposes affecting the health, comfort, pleasure, and
83 recreation of the people and thus conducing to their welfare. In *Kingman v. Brockton*, 153 Mass. 255, the court said, refer-

ring to a statute authorizing the raising of money by taxation for the erection of a memorial hall: "That statute * * * may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statutes, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing fresh air, or recreation, or by educating the public taste, or by inspiring sentiments of patriotism or of respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests on sound principles." See also *Higginson v. Nahant*, 11 Allen, 530, and *Hubbard v. Taunton*, 140 Mass. 467. In *Olmstead v. Camp*, 33 Conn. 532, 551, the court, in discussing the line between public and private uses, says: "From the nature of the case there can be no precise line. The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The
84 sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts." The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature in the varied forms which the changing seasons bring. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting and, in the highest sense, educational. If wisely planned and properly cared for they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them to make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not also justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated. We have already quoted from the information the language in regard to the
85 surroundings of the square. The counsel on both sides referred in argument to the well-known buildings which constitute these surroundings. Trinity church, the Museum of Fine Arts, the Boston public library, the New Old South church, the Second Church of Boston, and the buildings of the Massachusetts Institute of Technology all face the beholder who stands on Copley square and looks around him. Some of these buildings are public in the ordinary sense of the word, and some of the corporations which own them have been beneficiaries of the Commonwealth on account of their quasi-public character, and the public certainly feels

an interest in them. It is argued by the defendants that the legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley square. If this is a fact, and if the statute is merely for the benefit of individual property-owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the Commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the law-making power might not determine that this was a matter of such public
86 interest as to call for an expenditure of public money, and to justify the taking of private property. While such a determination should not be made without careful consideration, and while the growing tendency towards an enlargement of the field of public expenditure should be jealously watched and carefully held in check, a determination of this kind once made by the legislature cannot be lightly set aside.

It may be contended that if the legislature could take this right for the use of the public, it could not require the city of Boston to make compensation for it, but should have provided for the payment of damages from the treasury of the Commonwealth. This contention would limit too strictly the power of the legislature in the distribution of public burdens. Very wide discretion is left with the law-making power in this particular. The legislature may change the political subdivisions of the Commonwealth by creating, changing, or abolishing particular cities, towns, or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. *Kingman, petitioner*, 153 Mass. 566, and cases and statutes there cited. It does not depend upon the clause of the Constitution which authorizes the imposition of taxes, but upon the more general provisions defining the power of the legislature. While the interest to which this statute looks is
87 public, it is largely local. A very large part of the public who are affected by the statute are citizens of Boston. The valuation of Boston is a large proportion of the valuation of the whole Commonwealth. The legislature might well put the whole of this public burden upon the city of Boston.

It appears that on October 31, 1898, the board of park commissioners voted "that the sculptured ornaments erected on the building * * * above the height of ninety feet, as shown in the plans thereof submitted to the board and in the building as now erected," be approved. The building is rectangular, and the height of its walls to the roof is ninety-six feet. The ceilings of the rooms in the upper story are a few inches above a horizontal line of the height of ninety feet. Above these rooms there is an open air space extending to the roof, a distance of about four feet, measured on the inside of the outer walls of the building. The walls of the building are of brick, and on the two sides fronting on the streets there is an ornamental facing of terra-cotta partly in relief and ex-

tending from a line ninety feet in height upward to the roof, constituting the architrave, frieze, and cornice of the building, which are referred to in the vote of the park commissioners as sculp-
88 tured ornaments. On the other two sides of the building the walls of a corresponding height are of plain brick. The question arises whether the approval of these ornaments by the park commissioners relieves the building from the prohibition of the statute. It seems to us very clear that it does not. The prohibition against erecting a building above the height of ninety feet is absolute, except that certain erections which are usually above the substantial parts of a building may, with the approval of the park commissioners, be put "on any such building" above that height. These are "steeples, towers, domes, sculptu-ed ornaments, and chimneys." It is only as these become a part of the building by their erection upon it that any part of the building can be built to a greater height than ninety feet. All other parts of the building are left within the prohibition. But the ornaments put upon this building are not "erected on a" building constructed within the limits prescribed for it. We have a building with its solid brick walls extending six feet above the prescribed limit, and its roof at the top, and an enclosure within. The park commissioners, by their approval of certain sculptured ornaments on the face of the wall on two sides of the building, did not assume to approve of other parts of the building which constitute the solid structure, and the statute gave them no authority to approve of other parts of it, or
89 of the building as a whole. The statute intended that the main structure of the building should not extend above the prescribed line, and that only the specified parts which should project above the building proper, might, if approved, be erected on the building. It does not even permit roofs to be built above the line, as did St. 1897, c. 379, which it repeals. What the park commissioners were authorized to do was to approve sculptured ornaments surmounting a ninety-foot building; what they have done is to approve the ornamentation of the architrave, frieze, or cornice of two of the four walls of a ninety-six-foot building, leaving the other two walls unornamented ninety-six feet in height. In reference to the building proper as distinguished from the ornamentation on the face of two of its walls, the defendants can derive no advantage from the vote of the park commissioners.

It is contended by the defendants that the attorney general cannot maintain a suit in equity to enforce this statute. His right depends upon the construction put upon the statute. We hold that the statute gives rights in the nature of an easement over lands facing Copley square which easement is annexed to the square for the benefit of the public, for whose use and enjoyment Copley square was laid out; and that these rights are similar in their nature
90 to rights in highways, in great ponds, and in the navigable waters of the Commonwealth. For a deprivation of such public rights, an individual, unless he has suffered damages different in kind from those to the public generally, cannot maintain an action. The attorney general, as a public officer, represents the

public, and may bring all proper suits to protect their rights. The wrong alleged in the present case, if permitted, would work a permanent injury to the public, depriving them of that which the statute gives them. It is a purpresture which, while not in a strict and narrow sense a public nuisance, is in the nature of a public nuisance, is sometimes called a public nuisance, and in equity is to be dealt with as a public nuisance. *Commonwealth v. Wilkinson*, 16 Pick. 175. *Attorney General v. Boston Wharf Co.* 12 Gray, 553. *Attorney General v. Woods*, 108 Mass. 436. *Jenks v. Williams*, 115 Mass. 217. *Attorney General v. Old Colony Railroad*, 160 Mass. 62. *People v. Vanderbilt*, 26 N. Y. 287. In regard to the enforcement of rights given to the public and to other land-owners in lands reserved for their use by the Commonwealth, see *Attorney General v. Gardiner*, 117 Mass. 492, 499; *Attorney General v. Williams*, 140 Mass. 329, 330, 331; *Attorney General v. Algonquin Club*, 153 Mass. 447, 454. In England it is held that "the attorney general has a right to represent the public, either in equity or by prosecution at law, in cases where the public interests are exposed to danger or mischief." *Attorney General v. Birmingham & Oxford*
91 *Junction Railway*, 3 Macn. & G. 453. *Attorney General v. Mid-Kent Railway*, L. R. 3 Ch. 100. *Attorney General v. Shrewsbury Bridge Co.* 21 Ch. D. 752. *Attorney General v. Cockermouth Local Board*, L. R. 18 Eq. 172. In *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361, 364, it was said in reference to a great pond that, where an aqueduct corporation proceeds to draw off water to such an extent "as to injure or endanger the rights of the public therein, an information in equity would furnish the only adequate means of asserting and protecting the rights of the Government and of the public." The case of *Attorney General v. Abbott*, 154 Mass. 323, under facts very similar to those of the present case, sustains the right of the attorney general to maintain an information in equity for the protection of public rights in land dedicated to the use of the public as a park. Of similar purport is *Attorney General v. Tarr*, 148 Mass. 309, 314. His right in *Attorney General v. Revere Copper Co.* 152 Mass. 444, a similar case, was assumed. See also *Attorney General v. Metropolitan Railroad*, 125 Mass. 515; *Attorney General v. Consumers' Gas Co.* 142 Mass. 417. We are of opinion that the attorney general is the proper party, and that an information in equity is the proper form of proceeding for the enforcement of public rights against encroachments like those threatened in the present case.
92 There remains to be considered one other objection to the right of the attorney general to maintain this suit. It is argued that by St. 1894, c. 257, the city of Boston is given the right to enforce its building laws, that this remedy excludes all others, and that it applies to violations of the St. of 1898, c. 452. It is true that when a statute provides a remedy for violations of it, the remedy is generally exclusive; but if it provides no remedy, relief from wrongs against it is to be sought at common law. *Andover Turnpike v. Gould*, 6 Mass. 40, 44. *Wiley v. Yale*, 1 Met. 553. *Elder v. Bemis*, 2 Met. 599, 604. *United States v. Laeseki*, 29 Fed. Rep. 699, and cases cited. St. 1894, c. 257, is as follows: "The supreme judicial court,

or any justice thereof, and the superior court, or any justice thereof, in term time or vacation, shall, on the application of the city of Boston by its attorney, have jurisdiction in equity to enforce or prevent the violation of the provisions of the acts relating to the erection or alteration of buildings or other structures in the city of Boston, and may, on such application, restrain the erection, alteration, use, or occupation of any such building or structure which is being, or has been erected or altered in violation of any of the provisions of said acts." It was passed in reference to the elaborate statutes then in force enacted under
93 the police power of the legislature for the regulation of the erection of buildings in the city of Boston. When it was passed, no such statute as that invoked by the attorney general was contemplated. Whether the words "acts relating to the erection or alteration of buildings or other structures in the city of Boston" were intended to include any new and independent acts of a kindred character that might afterwards be passed, as distinguished from existing acts and amendments of them, may well be questioned. The natural construction of the words would make them apply only to conditions then existing. The statute under which this information is brought, as we construe it, materially differs from the acts relative to the erection of buildings in the city of Boston, existing when the previous statute was passed. It was enacted for a different purpose. It creates public rights annexed to public property. It calls for the payment of damages for the taking of an interest in lands, and exacts the payments from the city of Boston. The city has a pecuniary interest against the enforcement of the law. The statute does not provide a remedy for its enforcement, and therefore the remedies must be sought at common law. The kind of remedy provided by the statute in regard to the building laws gives no security to the public for the protection of their rights, for the
94 party to enforce it has an adverse interest, and cannot be compelled to proceed. We are of opinion that St. 1898, c. 452, was not intended to create rights enforceable only under St. 1894, c. 257, but creates rights which are enforceable under general laws. In the opinion of a majority of the court the entry must be,

Demurrer and pleas overruled.

94½ [Endorsed:] Attorney General *vs.* Williams. Certified copy of the opinion of the supreme judicial court.

95 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *May* 18, 1901.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Attorney General *vs.* Henry B. Williams decided on the 13th day of May, 1901.

HENRY W. SWIFT,
Reporter of Decisions.

96 KNOWLTON, *J.*:

This case was considered by the full court on the bill, demurrer, plea and certain facts found at the hearing before a single justice, and was reported in 174 Mass. 476. It now comes before us for a final decree on the pleadings and certain facts agreed by the parties, subject to objection as to their competency. We need only consider how far, if at all, the aspect of the case is changed by the competent facts agreed.

The defendants contend that a decree cannot be entered in this suit without first joining the City of Boston, which is made liable by the statute for such damages as the defendants suffer from the taking of an interest in their land, and they have moved to have the city made a party. This motion was rightly overruled. The City of Boston is not a proper party to this suit. Its rights and
97 liabilities in reference to the taking are fixed by the statute, and it is not entitled to be heard on the question whether the defendants are violating the law; nor does the fact that the defendants must resort to the city for the recovery of their damages, and that the city may then raise some of the questions which have been heard and determined in this suit, constitute a sufficient reason for bringing the city into litigation on subjects to which its interests are only collateral.

The former decision was upon an averment of the bill "that Copley square, upon which said St. James avenue abuts, is an open square and a public park intended for the use, benefit and health of the public, and is surrounded by buildings devoted to religious, charitable and educational purposes, some of which contain books, manuscripts and works of art of great value." It is contended that the facts agreed fail to sustain this averment. Without considering these facts in detail, we are of opinion that they fully sustain the averment.

The agreed facts as to the construction of the building leave the case as it was formerly presented, without material modification. The erection of the building to its present height was expressly forbidden by the statute.

98 The statute is not unconstitutional as impairing the obligation of contracts. In addition to the express provisions contained in section three, covering certain kinds of damage, there is a general provision in section four which gives compensation to any person sustaining damage by reason of the limit of the height of the buildings provided for in the act.

Most of the matters stated in regard to the proceedings preliminary to the passage of the act, are incompetent. The act must be construed by an application of its language to the subject to which it relates. If it can be given a reasonable construction which will sustain it as constitutional, it would be our duty so to construe it, even if it appeared that in the endeavors which suggested the legislation, considerations were presented to the legislature which would not be a sufficient constitutional justification for such an enactment.

The facts disclosed in regard to the circumstances preceding the commencement of this suit do not sustain the defence of laches.

Decree for the plaintiff.

98½ [Endorsed:] Attorney General *vs.* Henry B. Williams Certified copy of the opinion of the supreme judicial court.

99 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Hosea M. Knowlton, of New Bedford, in the county of Bristol and State of Massachusetts, attorney general of said State, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be holden in the city of Washington in the District of Columbia on the fourteenth day of June next, pursuant to a writ of error filed in the clerk's office of the supreme judicial court of the State of Massachusetts, in the county of Suffolk wherein Henry Bigelow Williams and Charles F. Ayer, trustees, both of Boston in said county and State are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

[SEAL.] Witness, the Honorable Oliver Wendell Holmes, chief justice of the supreme judicial court of the State of Massachusetts, this sixteenth day of May, in the year of our Lord one thousand nine hundred and one.

OLIVER WENDELL HOLMES,
Chief Justice S. J. C. of Massachusetts.

Service is accepted.

J. M. HALLOWELL,
Assistant Attorney General, for the Attorney General.

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

BOSTON, *May* 16, 1901.

I hereby certify that on the 16th day of May, 1901, I served the within citation by reading this writ and giving a copy of the same to J. M. Hallowell assistant attorney general who accepted service for the within-named Hosea M. Knowlton, and has endorsed said acceptance on this writ.

J. H. WATERS,
Deputy United States Marshal.

100 (*Bond on Writ of Error.*)

Know all men by these presents, that we, Henry Bigelow Williams and Charles F. Ayer, both of Boston in the county of Suffolk and State of Massachusetts, as principals, and Frederick Ayer of Lowell in said State as surety are held and firmly bound unto Hosea M. Knowlton of New Bedford in the county of Bristol in said State, attorney general of said State of Massachusetts, in the full and just sum of five thousand dollars to be paid to the said Hosea M. Knowlton, attorney general, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the eleventh day of May in the year of our Lord one thousand nine hundred and one.

Whereas lately at a term of the supreme judicial court of said State of Massachusetts at Boston in the county of Suffolk, on the thirteenth day of March in the year 1901, in a suit depending in said court between said Hosea M. Knowlton, attorney general, plaintiff, and said Henry Bigelow Williams and Charles F. Ayer, trustees, defendants, a final judgment and decree was rendered against the said Williams and Ayer, trustees, defendants, and the said Williams and Ayer, trustees, having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Hosea M. Knowlton, attorney general, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the fourteenth day of June next:

Now the condition of the above obligation is such, that if the said Henry Bigelow Williams and Charles F. Ayer, trustees, shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

HENRY BIGELOW WILLIAMS. [L. S.]
CHARLES F. AYER. [L. S.]
FREDERICK AYER.

Signed, sealed and delivered in presence of

——— ———.

Approved:

OLIVER WENDELL HOLMES,
Chief Justice S. J. C. of Massachusetts.

A true copy of said bond.

Attest: JOHN NOBLE,
Clerk Sup. Jud. Ct.

101 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Supreme Judicial Court.

I, John Noble, clerk of the supreme judicial court within and for the county of Suffolk, hereby certify that the foregoing are true copies of

I. The record in the case of—

HOSEA M. KNOWLTON, Attorney General,
v.
HENRY BIGELOW WILLIAMS ET AL., TRS., ET AL. } In Equity.

in said supreme judicial court determined; and annexed to and transmitted with said record, of—

II. The application for writ of error and the assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation, with acceptance of service and the return of service, thereon.

102 In witness whereof I have hereunto set my hand and the seal of said court this twentieth day of May, in the year of our Lord, one thousand nine hundred and one.

[SEAL.] JOHN NOBLE, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled May 20, 1901. J. N. }

Endorsed on cover: File No. 18,198. Massachusetts supreme judicial court. Term No. 116. Henry Bigelow Williams and Charles F. Ayer, trustees, plaintiffs in error, *vs.* Hosea M. Knowlton attorney general of Massachusetts. Filed June 10th, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 116.

HENRY BIGELOW WILLIAMS and CHARLES F. AYER,

PLAINTIFFS IN ERROR,

v.

HOSEA M. KNOWLTON,

DEFENDANT IN ERROR.

In Error to the Supreme Judicial Court of Massachusetts.

Brief for the Plaintiffs in Error.

Statement of the Case.

This writ of error is brought to reverse a decree of the Supreme Judicial Court of Massachusetts, upon an information in equity in the name of the attorney general, originally at the relation of the Museum of Fine Arts in Boston, requiring the cutting down and removal of the upper part of the building in Boston known as the Westminster Chambers, belonging to the defendants below, now the plaintiffs in error, on the ground that it encroaches upon a public easement limiting its height.

The decree is deemed erroneous, as amounting to a deprivation of the plaintiffs in error of their property without due process of law, in violation of the Fourteenth Amendment; in that the provision for compensation or damages in the statute of eminent domain upon which it is based is of doubtful validity and insufficient to warrant such a decree in advance of a conclusive determination that it is valid and enforceable; which question is yet undetermined and cannot be determined in this proceeding.

The single question in the case is, substantially, whether it is consistent with due process of law for a court to decree the actual destruction of property under a statute of eminent domain by which the state takes certain rights in it, making provision for compensation only by giving the owners a right of action against a city for their damages, while the city, which had no part in the taking, denies the validity of the provision for compensation, upon which the validity of the taking depends, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which is yet undetermined.

The statute upon which the case arises is, in some particulars, without precedent in Massachusetts legislation or probably elsewhere. As essential to a clear understanding of the statement, it is introduced at this point: —

MASSACHUSETTS STATUTE OF 1898, CHAPTER 452.

AN ACT RELATIVE TO THE HEIGHT OF BUILDINGS ON AND NEAR COPLEY SQUARE IN THE CITY OF BOSTON.

Be it enacted, etc., as follows:

SECTION 1. Any building now being built or hereafter to be built, rebuilt or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied

by the Pierce building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be completed, built, rebuilt or altered to the height of ninety feet, and no more; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt or altered to the height of one hundred feet, and no more: *provided, however*, that there may be erected on any such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve.

SECTION 2. The provisions of chapter three hundred and thirteen of the acts of the year eighteen hundred and ninety-six, and of chapter three hundred and seventy-nine of the acts of the year eighteen hundred and ninety-seven, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in section one of this act.

SECTION 3. The owner of or any person having an interest in any building upon any land described in section one of this act, the construction whereof was begun but not completed before the fourteenth day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by section one of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit prescribed for that locality by section one of this act, less the value of such materials as are not required on account of the limitations resulting from the provisions of this act, and the actual cost or expense of any re-arrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in

the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

SECTION 4. Any person sustaining damage or loss in his property by reason of the limit of the height of buildings provided for in this act, may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

SECTION 5. This act shall take effect upon its passage. [*Approved May 23, 1898.*

This statute is held by the Massachusetts court to be an exercise of the power of eminent domain, for the improvement of the light, air, and view of the public square or park on which the building stands, and to amount to a taking, for this purpose, of property rights, in the nature of an easement, in the estate of the plaintiffs in error. (Record, pp. 55, 57, 58, 60.)

The features of the statute to which special attention is called are (1) that it purports to take rights in certain specific parcels of land, in the nature of an easement limiting the height of buildings thereon; (2) that the taking is directly made by the legislative act; (3) while the only provision for compensation or damages is that the owners may recover damages against the city of Boston therefor. The taking is directly by the state, while the damages are cast upon the city.

The building stands upon land "abutting on St. James avenue between Clarendon street and Dartmouth street," as described in section 1 of the statute; the provision applied to that land being that any building upon it "may be completed, built, rebuilt or altered to the height of ninety feet and no more . . . provided, however, that there may be erected on any

such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve."

The building is for residential apartments, and was originally designed to be of the height of 120 feet (which was then lawful) and to consist of ten stories, with an ornamental architrave, frieze, and cornice, about six feet in height, above the tenth story. (Agreed Facts, Record, p. 28.) At the time of the passage of the statute, May 23, 1898, the building was in process of erection, and about half completed. (Agreed Facts, Record, p. 29.)

The statute restricted the building to eight stories, the height of which is about 90 feet, instead of ten stories, of the height of 120 feet, as originally designed. Upon its passage the owners conferred with the city authorities, and various methods of completing the building in conformity to the statute were considered. "It was the opinion of the mayor and law officers of the city and of the defendants' counsel that, in any view of the statute, the building could be lawfully completed at the height of eight stories, with the architrave, frieze and cornice of sculptured ornaments thereon, as originally designed, if such ornaments were approved by the park commissioners, under the authority conferred by the statute." The owners were given to understand that they would be so approved. Accordingly, the exterior walls of the building were carried up to the height of about six feet above the eighth story, enclosing an air-space, and the architrave, frieze, and cornice of sculptured ornaments were imposed upon and tied into the face of the upper six feet of the walls upon the two street fronts of the building, of which they form a part. The extreme height of the building as completed, including this ornamental superstructure, is 96 feet. (Agreed Facts, Record, pp. 31, 32.)

This was done in good faith, all parties concerned believing that such construction, with the approval of the park commissioners, was permitted by the statute. "It was the opinion and belief of the city law officers, the mayor, the defendants' counsel and the defendants, that such approval would make the structure lawful, in any view of the statute." (Agreed Facts, Record, p. 31.)

Thereupon the park commissioners voted their approval of the ornamental superstructure, in the form shown in the record. (Agreed Facts, Record, pp. 31, 32.)

September 17, 1898, when the building was substantially completed, this information was brought, seeking to enjoin the maintenance of that part of the building above the ninety feet line, which alone is in question. The defendants filed a demurrer, plea, and answer; the demurrer and answer setting up, with other defences not now material, that "the statute . . . in its application to the defendants, . . . is in violation of the second clause of section 1 of the 14th Amendment and of other provisions of the constitution of the United States." (Record, pp. 7, 11, 16, 19, 25, 26.)

The case was reserved by the presiding justice for the full court. October 30, 1899, the court, by a majority decision, overruled the demurrer and pleas, holding the statute constitutional. (Record, pp. 13, 54–60.)

Pending this proceeding, the defendants therein, to save the statutory limitation of time, brought petitions against the city of Boston, under sections 3 and 4 of the statute of 1898, for the damages to their building and estate which the statute purports to provide. The city filed a general denial by way of answer. The city officials who control its action on the subject deny any liability to the petitioners, the plaintiffs in error; deny that the statute imposes any

valid obligation upon the city to pay damages; deny the power of the legislature to require the city to pay damages in such a case; and refuse to pay any damages unless and until it is finally and conclusively determined in that proceeding that the city is liable therefor. These petitions are still awaiting trial. (Agreed Facts, Record, p. 44.)

January 30, 1900, the defendants below brought this attitude of the city to the attention of the court, and moved that the present proceeding be continued to await determination of the validity of the statutory provision for damages. The court took no action upon this motion. (Record, p. 14.)

October 2, 1900, the defendants below amended their answer, setting up the refusal of the city to pay damages; its lack of any moneys, or power to raise or appropriate moneys, for the purpose; alleging that the city should be joined as a party to the information, in order that the validity of the statutory provision for damages may be determined in this proceeding, and reasserting that "the statute of 1898, in its application to the defendants, is in violation of . . . the second clause of section 1 of the 14th Amendment and other provisions of the constitution of the United States." (Record, pp. 15, 16.)

At the same time the defendants moved that the informant be required to join the city as a party defendant, in order that the question of the city's liability to damages might be conclusively determined in this proceeding, or, in default of such joinder, that the prosecution be stayed until the city's liability to damages could be conclusively determined in the other proceeding against it. This motion was denied, and the defendants appealed from the denial thereof. (Record, p. 17.)

November 7, 1900, the defendants *moved that the* case be sent to a master, to ascertain what alterations in the building were necessary to make it conform to

the opinion of the court rendered on the demurrer and plea, with a view to make such alterations and avoid farther litigation. This motion was denied, and the defendants appealed. (Record, p. 18.)

December 13, 1900, the defendants further amended their answer, reasserting therein that "the statute . . . in its application to the defendants . . . is in violation of the second clause of section 1 of the Fourteenth Amendment and other provisions of the constitution of the United States." (Record, pp. 19, 25, 26.)

At the same time an agreed statement of facts was filed by the parties (Record, pp. 27–49), and the case was thereafter reserved by the presiding justice, upon the pleadings, the defendants' motion to have the city of Boston made a party, the appeal from the overruling thereof, and the agreed facts, for the consideration of the full court. (Record, p. 50.)

March 13, 1901, the full court rendered an opinion re-affirming the constitutionality of the statute, and overruling all other defences (Record, pp. 61, 62), and entered a final decree, in the form exhibited in the record, pp. 50, 51.

The decree enjoins and restrains the defendants "from *maintaining* the building mentioned in the information and known as Westminster Chambers, *after the first day of October next, above the height of ninety feet*, and from hereafter constructing or erecting it above that height, and from maintaining it above that height if newly constructed; without prejudice, however, to their right under the statute to maintain or erect and maintain on said building above the height of ninety feet such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may hereafter approve; *and the said Williams and Ayer, trustees, are commanded and directed on or before the first day of October next to take down and*

remove those parts of the walls of said building which are above the height of ninety feet, and such other parts of said building as are above that height; this is without prejudice however to their right under the statute to erect and maintain such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may *hereafter* approve." (Record, pp. 50, 51.)

The execution of the decree was stayed by this writ of error, and awaits the decision of this court thereon.

Specification of Errors Relied On.

The plaintiffs in error rely on the first error assigned, namely: —

1. The court erred in enjoining and restraining the defendants from maintaining the building mentioned in the information and known as the Westminster Chambers, after the first day of October next, above the height of ninety feet, and from hereafter constructing or erecting it above that height; and in commanding and directing the defendants, on or before the first day of October next, to take down and remove those parts of the walls of said building which are above the height of ninety feet, and such other parts of said building as are above that height (Record, p. 52.)

The decree is erroneous, in this:

It is not consistent with due process of law, in the sense of the Fourteenth Amendment, for a state court to decree the actual cutting down of a building under a statute of eminent domain by which the state assumes *to have taken* a right, in the nature of an easement in the estate, to limit its height, making

provision for compensation to the owners only by giving them a right of action for damages against the city in which the building stands, while the city, which is not a party to the proceedings or decree and therefore is not bound thereby, and which had no part in the taking and therefore is not estopped to dispute its validity or its own liability to damages, denies the constitutionality of the statute, the validity of the taking, and the validity of the requirement that it shall pay damages, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which question remains undetermined at the time of the decree, and cannot be finally determined in this proceeding, as the city is not party to it, nor by the state court in any other proceeding, in view of the legal right of the city to bring it before this court for final determination.

As such a decree at this stage may result in the destruction and loss of the property without the compensation to the owner which is essential to due process of law in the exercise of eminent domain, it fails to satisfy the requirements of the due process clause of the Fourteenth Amendment.

For the purpose of reversing the present decree the plaintiffs in error rely also on the assignments of error numbered 2 to 6, inclusive, as follows: —

> "2. The court erred in ruling and holding that said Massachusetts statute of 1898, chapter 452, is not in conflict with the clause of the 14th Amendment of the Constitution of the United States forbidding any state to deprive any person of property without due process of law.
>
> "3. The court erred in ruling and holding that said statute does not deprive the defendants of their property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

"4. The court erred in ruling and holding that said statute makes due provision for just compensation for the property of the defendants thereby taken, as required by due process of law under the 14th Amendment aforesaid.

"5. The court erred in ruling and holding that no provision for an award of damages to the defendants for their property taken by said statute without an action brought by the defendants therefor, is essential to due process of law under the 14th Amendment aforesaid.

"6. The court erred in ruling and holding that the requirement of said statute that the city of Boston shall pay damages to the defendants for their property thereby taken is sufficient provision for just compensation to the defendants, as required by due process of law under the 14th Amendment aforesaid." (Record, p. 53.)

As to these assignments of error:

The particular thing now complained of is that the decree requires the actual cutting down of the building *while it is yet uncertain whether the statute makes any valid and enforceable provision for compensation or damages, or, therefore, whether it has lawfully effected a taking of any rights in the estate.*

The ultimate question whether the statute is constitutional in its application to the city of Boston, that is, whether the legislature has power to take this property for this purpose and require the city to pay the damages, cannot be finally determined in this proceeding, to which the city is not a party.

The question now presented is whether it is consistent with the Federal requirement of due process of law for a state legislature to authorize, or a state court to decree, the enforcement of a statute of emi-

nent domain by actual dispossession and destruction of property, while the third party, on whom alone the statute cast the damages, disputes, and has a right to dispute, its liability to damages, on which the validity of the taking depends, and refuses to pay unless and until held liable in another proceeding yet undetermined.

In other words, the case does not present for final determination the question whether the statute is constitutional in its application to the city. It presents only the question whether it is so far constitutional in its application to the plaintiffs in error as to warrant this decree against them at this time and under these circumstances.

Brief of the Argument.

Preliminary Points.

The case comes to this court under the second specification of Rev. Sts. U.S. sec. 709, for re-examination of the final decree in a suit which draws in question the validity of the Massachusetts statute of 1898, c. 452, and the authority exercised thereunder to make the decree, on the ground of their repugnancy to the requirement of due process of law in the second clause of section 1 of the Fourteenth Amendment of the Federal constitution.

The objection that the statute is in conflict with this

clause of the Fourteenth Amendment was clearly seasonably and repeatedly presented below (Record, pp. 7, 11, 16, 19, 24, 25, 26); though this may have been unnecessary in this case. It is immaterial that the court did not specifically discuss or expressly overrule the Federal objections in its judgment or opinion. The decree could not have been made without overruling them.

> *Chicago &c. R.R. Co.* v. *Chicago*, 166 U.S. 226, 231.
> *Yazoo & Miss. Railway Co.* v. *Adams*, 180 U.S. 1, 14, and cases cited.

As the statute is the only foundation for the decree, it is evident that the state court held it sufficient, notwithstanding the Federal objections, to warrant a decree for the cutting down of the building at the time and under the circumstances disclosed, namely, in advance of a conclusive determination of the validity of the provision for damages, or of the taking. This conclusion necessarily involves the rulings specified in the assignments of error numbered 2 to 6, inclusive, all of which are essential to the making of the decree.

And as the decree necessarily involves determination that the statute, in its application to the plaintiffs in error, is not in any particular in contravention of the due process clause of the Fourteenth Amendment, and that the court, by virtue of the statute, [illegible] properly proceed to cut down the building while the validity of the taking and of the provision for damages remain undetermined, the Federal objections taken below to the statute, equally apply to and affect the decree. The decree necessarily negatives all the Federal objections, and is itself the final and conclusive ruling and determination of the state court that neither of them is to be sustained.

The statement of agreed facts is properly before the court, as part of the record. It was made part of the record of the state court by the terms of the reservation. (Record, p. 50, as amended.)

Old Colony Railroad Co. v. *Wilder*, 137 Mass. 536, 537.
England v. *Gebhardt*, 112 U.S. 502, 505, and cases cited.

This court is not asked to review any question of fact. The only facts to which the plaintiffs in error call special attention, as part of the history of the case, showing the situation of the parties and the circumstances under which the decree below was made, are that the city of Boston is actually resisting the proceeding for damages, on constitutional grounds, denying its liability to damages and refusing to pay; that this proceeding is still undetermined and awaiting trial; that the city is without funds to meet such liability, has no specific power to raise or appropriate moneys for such a purpose, and has only a limited power to incur any indebtedness; as set out in the record, pp. 44, 45.

All the assignments of error relied on involve but the single question of the repugnancy of the statute and the decree to the due process clause of the Fourteenth Amendment, and may be dealt with together.

The Main Question.

The case presents a narrow but important question, affecting the rights of every person whose property is taken by eminent domain under state authority.

By a direct legislative act of eminent domain the state takes for the public, for improvement of the light, air, and view of a public square or park, certain rights in an estate contiguous thereto, in the nature of

an easement limiting the height of buildings thereon. To the validity of this statute due provision for just compensation is essential. It provides compensation only by giving the owners a right of action for damages against the city in which the estate lies. Immediately upon completion of the building thereon, a proceeding in the name of the attorney general is brought against the owners to restrain them from maintaining a part of it which is alleged to exceed the limited height. While the city, which was not party to the taking and therefore is not estopped to dispute its validity, and which is not party to this proceeding and therefore is not bound thereby, in the exercise of its legal rights is disputing the validity of the provision for compensation, on which the validity of the taking depends, and denying its own liability to damages and refusing to pay damages unless and until it is held liable therefor in another proceeding yet undetermined, the court makes a decree against the owners requiring the cutting down and removal of that part of the building which is adjudged to exceed the limited height.

Shortly stated, the question which arises is substantially this: Is it consistent with the Federal requirement of due process of law, in the Fourteenth Amendment, for a state court to enforce, by dispossession and destruction of property, a statute of eminent domain, to the validity of which due provision for just compensation is essential, while the questions whether the statute contains any valid and enforceable provision for compensation or damages, and the resulting question whether there has been any valid taking of any rights in the property, are uncertain and are actually disputed in litigation and undetermined?

The Massachusetts court holds the statute of 1898

to be an exercise of the power of eminent domain, taking property rights in the nature of an easement in the estate of the plaintiffs in error. (Record, pp. 55, 57, 58, 60.) As the statute purports to provide compensation, and as it has no relation to the public health, morals, or safety, this is practically a necessary construction.

> *Talbot* v. *Hudson*, 16 Gray, 417, 420.
> *Dorgan* v. *Boston*, 12 Allen, 223, 230.
> *Parker* v. *Commonwealth*, 178 Mass. 199, 204.
> *Sweet* v. *Rechel*, 159 U.S. 380, 396, *et seq.*

This construction will be accepted by this court and the statute dealt with accordingly.

> *W. W. Cargill Co.* v. *Minnesota*, 180 U.S. 452, 466, and cases cited.

The general principles applicable to the case are so familiar as hardly to call for citation of authority.

1. It is elementary that due provision for just compensation for private property taken for public uses is essential to the validity of an act of eminent domain. Without it, such an act is a nullity, incapable of warranting any interference with the property sought to be taken.

This is settled in Massachusetts, as it is universally, under the constitutional requirements, that "no subject shall be despoiled or deprived of his property . . . but by the judgment of his peers or the law of the land" (Declaration of Rights, art. XII); and that "No part of the property of any individual can *with justice* be taken from him or applied to public uses without his own consent or that of the represen-

tative body of the people. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive reasonable compensation therefor." (Declaration of Rights, art. X.)

Perry v. *Wilson*, 7 Mass. 393, 395.
Stevens v. *Props. of Middlesex Canal*, 12 Mass. 466, 468.
Brickett v. *Haverhill Aqueduct Co.*, 142 Mass. 394, 396.
Attorney General v. *Old Colony R.R.*, 160 Mass. 62, 90.
Bent v. *Emery*, 173 Mass. 495, 497, 498.

Without such provision the statute "is unconstitutional and void, and does not justify an entry upon the land of the owner without his consent."

Conn. River R.R. v. *County Comm'rs*, 127 Mass. 50, 52, and cases cited.

2. It is not enough that the statute *purports* to make provision for compensation. The provision must be certain, amounting to assurance of it, without risk of failure in any event. It is beyond legislative power to cast upon the property owner any hazard of loss of his property without compensation.

"The power to take and the obligation to indemnify for the taking are inseparable. They are parts of one transaction."

Drury v. *Midland Railroad*, 127 Mass. 571, 576.

"The duty of *paying* an adequate compensation for private property taken is inseparable

> from the exercise of the right of eminent domain. . . . The means for securing indemnity must be such that the owner will be put to *no risk* or unreasonable delay."

In this case the court doubted whether a right of action against towns would be enough, but held that it was the duty of the public authorities who made the taking to estimate and award the damages.

> *Haverhill Bridge* v. *Essex Comm'rs*, 103 Mass. 120, 124.

"It is not enough to leave the owner to his action at law for damages."

> FIELD, C.J., in *Attorney General* v. *Old Colony R.R.*, 160 Mass. 62, 90.

Where the damages are charged upon a particular fund in the hands of the state, though it is agreed to be adequate in amount, the statute is void for failure of certain provision for compensation.

> *Conn. River R.R.* v. *County Comm'rs*, 127 Mass. 50.
> *Brewster* v. *Rogers Co.*, 169 N.Y. 73, 80.

And where the state takes the property, with provision for ascertainment of damages "in the manner provided for the recovery of damages sustained by reason of the laying out of ways," the statute is unconstitutional, it not being sufficiently certain that the state assumes the damages. An implication, however clear, is not enough.

> *Bent* v. *Emery*, 173 Mass. 495, 497.

This court has held, under the constitution of Indiana, which is not different in substance or effect from that of Massachusetts, that "both on principle and authority the rule is, under such a constitution . . . that *the title does not pass from the owner*, without his consent, until just compensation has been *made* to him."

Kennedy v. *Indianapolis*, 103 U.S. 599, 604.

Where the statute provided for payment into court of double the amount of damages awarded by referees, before entry on the land, and this was challenged as insufficient, this court, declaring that "the owner is entitled to reasonable, *certain* and adequate provision for compensation *before his occupancy is disturbed*," sustained the statute on the ground that it required full compensation to be *made* before constructing the railway through the lands taken, and that "the title does not pass until compensation is actually made to the owner."

Cherokee Nation v. *Kansas Railway Co.*, 135 U.S. 641, 659.

Again, where the validity of the provision for damages was questioned on the ground that no sufficient appropriation for payment was made, this court sustained it on the ground that by the statute neither title nor possession passed until payment of damages.

Bauman v. *Ross*, 167 U.S. 548, 598.

And in the case of a direct taking by the United States, this court declared that the fact, had it appeared, that the appropriation for the payment of damages was exhausted before the beginning of pro-

ceedings to take the land, "would give rise to a very serious question."

United States v. *Gettysburg Railway*, 160 U.S. 668, 684.

In *Sweet* v. *Rechel*, 159 U.S. 404, 407, which is materially different from the present case, this court went no farther than to hold that under the Massachusetts constitution, if the statute expressly provides that the title shall pass in advance of payment, it does pass if the provision for compensation is such "that the owner *can certainly obtain* the amount of such compensation;" and the title was held to have passed, on the ground that "the provision made for compensating the owner was *certain* and adequate." There the city made the taking, and was thereby estopped to deny its validity or its own liability to damages, which was undisputed and indisputable.

3. Due provision securing just compensation to the owner of property taken in the exercise of the power of eminent domain by or under the states is required by the due process clause of the Fourteenth Amendment.

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 324, *et seq.*
Chicago, Burlington &c. Rd. v. *Chicago*, 166 U.S. 226, 235, 241.
Long Island Water Co. v. *Brooklyn*, 166 U.S. 685, 695.
Smyth v. *Ames*, 169 U.S. 466, 526.
Backus v. *Fort St. Depot Co.*, 169 U.S. 557, 565.
Norwood v. *Baker*, 172 U.S. 269, 277.

4. The Federal requirement of due process of law extends to judicial as well as to legislative action of

the states. The decree of a court may invade the requirement, no less than a statute.

> "A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."
>
> *Chicago, B. & Q. Rd.* v. *Chicago*, 166 U.S. 226, 241.

See also —

Virginia v. *Rives*, 100 U.S. 313, 318.
Ex parte Virginia, 100 U.S. 339, 346.
Civil Rights Cases, 109 U.S. 3, 11.
Logan v. *United States*, 144 U.S. 263, 290.
Scott v. *McNeal*, 154 U.S. 34, 45.
Gibson v. *Mississippi*, 162 U.S. 565, 581.
Williams v. *Mississippi*, 170 U.S. 213, 220.
Blake v. *McClung*, 172 U.S. 239, 260.

In the present case, if it is not consistent with due process of law for the court to order the actual destruction of the property while the question whether there is any valid taking or provision for compensation remains in dispute and undetermined, the decree should be reversed, notwithstanding the possibility that in the other proceeding for damages against the city the statute may eventually be held

constitutional and the provision for compensation valid. If assurance of just compensation is, as held by this court, a condition precedent to the exercise of eminent domain, without which the title does not pass in advance of payment, *à fortiori* is it a condition precedent to actual dispossession and destruction of the property.

The case is peculiar, as the statute out of which it arises is unprecedented. Ordinarily, in the direct taking of property by the state, the state expressly assumes the damages. If the power to take is delegated, the agency authorized to make the taking is expressly made liable. In either case, the act of taking estops the taker to deny its validity or its own liability to make compensation.

Gloucester Water Co. v. *Gloucester*, 179 Mass. 365, 377, 378, and cases cited.
See also *Daniels* v. *Tierney*, 102 U.S. 415, 421.
Electric Co. v. *Dow*, 166 U.S. 489.

Accordingly, in the ordinary case the question now presented could not arise.

Here, however, the taking is the direct act of the state, while the sole liability for damages is cast upon the city. The city, having no part in the taking, is at liberty to dispute, and does dispute, its liability for damages. This question is not and cannot be determined as against the city in this proceeding, as the city is not party to it. The defendants below repeatedly attempted to have the city joined or the prosecution stayed until the question of damages could be determined, but the court refused. (Record, pp. 14, 16, 17.)

The statute of 1898 provides for no bond, deposit, or other security for damages. There is nothing for

the property owner but a mere right of action against the city. "The manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city" of Boston, is according to the subjoined statutes:

St. 1888, c. 397, sec. 1:

SECTION 1. Sections eighty-four, eighty-five, and eighty-six of chapter forty-nine of the Public Statutes are hereby amended so as to read as follows: "*Section 84.* The board of street commissioners of the city of Boston shall have power to lay out, locate anew, alter, widen, and discontinue highways in the city of Boston and order specific repairs thereon, and whenever they are of the opinion that the public necessity and convenience require that a highway shall be laid out within said city, or that an existing highway shall be located anew, altered, widened, or discontinued, or that specific repairs shall be ordered thereon, the said commissioners shall appoint a time for a public hearing, and shall cause a notice thereof and of their intention in the matter to be published once a week for two successive weeks in two daily newspapers published in said city, the last publication to be at least seven days previous to the time fixed for said hearing. Said hearing may be adjourned from time to time, if the commissioners deem it necessary, and, after said hearing, said commissioners shall determine what action relating to said way the public necessity and convenience require; and such determination, being recorded in the records of said commissioners, the said way shall be thereby laid out, located, altered, widened, or discontinued, or specific repairs shall be ordered, in accordance with such determination. *Section 85.* Said commissioners shall estimate the amount of damage sustained by any persons in their property by such laying out, locating anew, altering, widening, or discontinuing, or ordering specific repairs on, a highway, and, in their aforesaid determination, shall state the share of each separately. *Section 86.* The city, or any party interested, if dissatisfied with the estimate of damage in

any case mentioned in the preceding section, may have the amount of such damages determined by a jury at the bar of the superior court, in the same manner in which other civil causes are there tried, by filing in the clerk's office of said court, for the county of Suffolk, at any time before the expiration of one year from the time when the lands are entered upon, and possession taken for the purpose of constructing the highway, or when no land is taken, from the time when the work is actually commenced on the highway, a petition for such jury. The petitioner before filing his petition shall notify the adverse party to appear and answer thereto, by causing a summons containing a copy of said petition to be served upon him in the manner provided by sections twenty-nine to thirty-six inclusive of chapter one hundred and sixty-one of the Public Statutes."

St. 1892, c. 415, sec. 3:

SECTION 3. Section eighty-six of said chapter as amended by chapter three hundred and ninety-seven of the acts of the year eighteen hundred and eighty-eight is hereby amended so as to read as follows:— *Section 86.* The damages sustained in any case specified in the preceding section shall be paid by the city of Boston, and said city, or any party interested, if they cannot agree upon the amount of such damages may, within the time specified for a like purpose in section thirty-three, file a petition for a jury in the office of the clerk of the superior court for the county of Suffolk, and thereupon, after such notice as the court shall order, a trial shall be had in the said court, in the same manner as other civil cases are there tried by jury, and if either party request, the jury shall view the place in question.

If the taking is not for a proper public purpose, as the city asserts, or if it is beyond the power of the legislature to take property for such a purpose at the expense of the city, or if the provision for compensation is insufficient, or if for any other reason the taking is invalid, — all which questions are open to the

city in the proceeding for damages, — the public has acquired no rights in the estate of the plaintiffs in error, and the court has no power to lay hands upon it.

While the city is litigating these questions, as it has an indisputable right to do, and while it is yet undetermined and necessarily uncertain whether the provision for damages is valid and enforceable, in default of which the public has acquired no rights in the property and the entire statute is a nullity, the court cuts down the building; leaving the owners to establish the liability of the city to damages if they can, and casting upon them the loss of their property without compensation if they cannot.

The plaintiffs in error are compelled, at one and the same time, to try with the state the validity and extent of the taking, in which the city had no part and for which it denies and has a right to deny its liability to make compensation, in a suit to which the city is not a party, and in which these questions are not and cannot be determined as against the city; and to try with the city the validity of the provision for compensation, upon which the validity of the taking depends, in a suit in which the state, which made the taking, is not a party and has no interest. And as the validity of the taking depends upon the validity of the provision for compensation, which can be determined only in the proceeding for damages against the city, the decree in the present case enforces, by actual destruction of property, alleged public rights the existence of which is yet uncertain and is legally disputed, and which, in the only case that can finally determine the question, may be held to have no existence.

The state court, which made the decree, cannot finally determine these questions in any proceeding. The city may bring them to this court for final determination. The state court, in the proceeding

against the city for damages, cannot hold itself bound by the judgment in this case. This would be, in effect, to hold the city bound, as clearly it cannot be. It is open to the city, in the proceeding for damages, to assail the statute on grounds not open to the plaintiffs in error in this case. In that case, the court must be governed by other considerations, and may find itself constrained to hold that the city is not liable. Or if it holds the city liable, this court may hold it not liable. In the meantime the building has been cut down; the plaintiffs in error have lost their property under an act which turns out a nullity from the beginning, and are left without remedy for compensation or damages.

The state itself cannot be compelled to make compensation. While a statute provides that "The Superior Court for the County of Suffolk shall have jurisdiction of all claims at law or in equity against the Commonwealth" (Mass. Rev. Laws, c. 201, sec. 1), the plaintiffs in error have no enforceable claim against the state if the statute is eventually held unconstitutional as against the city. The state has never undertaken this liability for damages; and it cannot be held liable for the acts of its public officers, whether merely tortious or in course of judicial procedure, under a void statute.

See *Conn. River Rd.* v. *County Comm'rs*, 127 Mass. 50, 56.
Murdock Grate Co. v. *Commonwealth*, 152 Mass. 28.
Bent v. *Emery*, 173 Mass. 495, 498.

In fine, in event of the provision for damages being held non-enforceable as against the city, which is possible in law and not wholly improbable in fact, the plaintiffs in error are arbitrarily despoiled of their property. They are at this moment, and until

this decree is reversed, exposed to spoliation. It is not due process of law that places them in this situation.

It is not to the purpose to say that this event is unlikely. It is legally possible, and actually uncertain. It is beyond legislative power to cast such a risk upon the owner of property taken by eminent domain. He has a fundamental right to compensation, and the right to be secure in it. Doubts must be resolved in favor of the right. The provision for damages cannot be presumed valid or enforceable unless it clearly appears, upon its face, to be so. The existence, at the time of passage of a statute, of facts essential to its validity may be presumed; but no presumption as to the determination of a future event, so uncertain as the result of contested litigation, can satisfy this imperative constitutional requirement. Authorities *supra*, especially —

Haverhill Bridge Props. v. *County Comm'rs*, 103 Mass. 120, 124, 125.
Conn. River R.R. v. *County Comm'rs*, 127 Mass. 50.
Bent v. *Emery*, 173 Mass. 495, 497.

While the question of the validity of the provision for compensation, or the resulting question of the validity of the taking, cannot be determined as against the city of Boston in this proceeding, it may readily be shown that the validity of each is so far doubtful that the statute cannot be said, upon its face, to make due provision for just compensation with the certainty required by due process of law in the exercise of eminent domain, or to warrant a decree for destruction of the property while this remains undetermined.

The established doctrine that cities are primarily political agencies of the state, and subject to its con-

trol in respect of their public powers and public property held for governmental purposes, does not reach the present question, of the degree of security for compensation required by due process of law in the exercise of eminent domain; and by no means settles the other question, of the ultimate liability of the city under this statute.

The decree goes on the ground that the statute is for the improvement of Copley square regarded as a public park, for which purpose the legislature may properly require the city to pay damages for property taken by act of the state. (Opinion of the court, Record, pp. 55–57.)

Unless the legislature has power to compel a city to establish public parks, it has no power to compel a city to take or pay for property for improving them when established. In the states in which the direct question whether the legislature may compel a city or town to establish public parks has been judicially raised, under constitutional provisions substantially like those of Massachusetts, it has uniformly been determined in the negative.

People v. *Hurlbut*, 24 Mich. 44, 93.
People v. *Detroit*, 28 Mich. 228, 233 *et seq.*
Park Comm'rs v. *Mayor*, 29 Mich. 343.
Thompson v. *Moran*, 44 Mich. 602.
Webb v. *Mayor of New York*, 64 How. Pr. 10.
Dillon, Munic. Corp. (4th ed.) secs. 71–74*a*.

See also *Atkins* v. *Randolph*, 31 Vt. 226.
State ex rel. McCurdy v. *Tappan*, 29 Wis. 664, 680, 687.
Louisville v. *University*, 15 B. Mon. 642.
State v. *Fox*, 63 N.E. Rep. 19, 21 (Indiana).

Until the present case, the Massachusetts court had never gone so far as to hold that the legislature may *compel* a city to tax its inhabitants for a system of public parks, nor is there believed to be authority for this proposition in any state. It had gone no farther than to hold that the legislature may *authorize* taxation for this purpose.

> *Holt* v. *Somerville*, 127 Mass. 408, 413.
> *Foster* v. *Park Commissioners*, 133 Mass. 321, 326.

And that court seems to regard parks, when established by a city under legislative authority, as held by it in a quasi-private and proprietary character, beyond legislative power to take away.

> *Props. of Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509, 519.

If the legislature cannot divest a city of property held by it in a proprietary character, it must be because the city, in that character, is not within legislative control as it is in its public or political character. If legislative control does not extend to such property, the legislature has no more power to compel a city to acquire it, or to take it for a city against its will and at its expense, than to take it away when acquired.

The city, in resisting the proceeding for damages, has the advantage of defending against a novel if not unprecedented statute, exercising, for a doubtful purpose, a power hitherto unheard of in Massachusetts if not elsewhere, the existence of which is denied by the only judicial authorities in point on the question. The privilege of prevailing against this defence if they can is the "due provision for just compensation" offered the plaintiffs in error by this statute, as satisfying the requirements of due process of law.

The city of Boston never had any moneys appropriated, nor any specific power to appropriate moneys, to meet the liability cast upon it by the statute of 1898; and its power to raise and appropriate money for any purpose is limited by statute. (Agreed Facts, Record, pp. 44, 45.)

At the time of the passage of the statute of 1898 the city was limited, in general taxation, to an assessment of $9 on each $1000 net valuation, and was forbidden to incur indebtedness to an amount exceeding 2 per cent of its valuation. At and since the time of the making of the decree, the limit of taxation was $10.50 per $1000, and the limit of indebtedness 3 per cent of the valuation.

The statutes material to this point are as follows: —

Public Statutes, c. 29:

SECTION 1. Cities and towns shall not incur debts except in the manner of voting, and within the limitations as to amount and time of payment, prescribed in this chapter.

SEC. 4. No city or town, except as provided in the following section, shall become indebted in an amount which exceeds three per cent on the last preceding valuation, for the assessment of taxes, of the taxable property therein.

St. 1885, c. 178 (as amended by St. 1887, c. 281, sec. 1), superseding, for Boston, the foregoing provisions:

SECTION 1. The taxes assessed on property in the city of Boston, exclusive of the state tax and county tax not exceeding four hundred and twenty-five thousand dollars and of the sums required by law to be raised on account of the city debt, shall not exceed in any year nine dollars on every one thousand dollars of the average of the assessors' valuations of the taxable property therein for the preceding five years, the valuation for each year being first reduced by the amount of all abatements allowed

thereon previous to the thirty-first day of December in the year preceding said assessment. Any order or appropriation requiring a larger assessment than herein first above limited shall be void.

SECTION 2. The limit of indebtedness of the city of Boston shall hereafter be two and one-half per cent. up to and until the first day of January in the year eighteen hundred and eighty-seven, and thereafter shall be two per cent. on the average valuation prescribed in section one of this act, instead of three per cent. on the last preceding valuation as provided in section four of chapter twenty-nine of the Public Statutes.

St. 1900, c. 399 (superseding St. 1885, c. 178):

SECTION 1. The taxes assessed on property, exclusive of the state tax, county tax and sums required by law to be raised on account of the city debt, shall not exceed in any year in the city of Boston ten and one-half dollars, and in any other city twelve dollars, on every one thousand dollars of the average of the assessors' valuations of the taxable property therein for the preceding three years, the valuation for each year being first reduced by the amount of all abatements allowed thereon previous to the thirty-first day of December in the year preceding said assessment; and any order or appropriation requiring a larger assessment than is herein limited shall be void.

SECTION 2. Chapter one hundred and seventy-eight of the acts of the year eighteen hundred and eighty-five and chapter two hundred and eighty-one of the acts of the year eighteen hundred and eighty-seven are hereby repealed.

It was formerly understood in Massachusetts that the property of the inhabitants is liable to seizure on execution for a debt of a city or town.

Conn. River R.R. v. *County Comm'rs*, 127 Mass. 50, 54, and cases cited.

Apparently this can no longer be regarded as the law.

Rees v. *Watertown*, 19 Wall. 107, 122.
Merriwether v. *Garrett*, 102 U.S. 472, 501, 519, 526.

Without the aid of these statutes or the agreed facts that the city is actually contesting the validity of the statute of 1898, and is without funds to meet this liability if enforceable, there is enough on the face of the statute to impeach its validity. A statute of eminent domain by which the state takes property and makes provision for compensation only by giving a right of action for damages against a third party, which third party had no part in the taking and is therefore legally at liberty to deny its validity and its own liability to damages, is insufficient, on its face, to support a decree for the destruction of the property unless and until it affirmatively appears at least that the validity of the taking and of the provision for compensation or damages is conclusively determined as against the party made liable. Such a statute cannot be held to provide compensation with substantial certainty, which is essential to due process of law. A statute which, upon its face, may not yield compensation is as defective as one which cannot.

It is plain, upon the face of the statute, that the alleged taking is the direct act of the state, in which the city had no part, and therefore that it is legally open to the city to dispute its validity and its own liability to damages, and legally possible that it may prevail in that dispute. If the provision for damages is invalid, the statute, so far as it applies to the plaintiffs in error, is a nullity, incapable of enforcement. If the taking is not for a proper public use, or is for any other reason invalid, the public has acquired no rights in the property, and the court has no power to molest it.

It is inconsistent with the inherent substance of due process of law, as universally understood and applied,

to enforce such a statute against the owner of the property, by actual dispossession and demolition, at least until the validity of the provision for damages, upon which the validity of the taking depends, is established as against the party made liable. The statute, construed to authorize such enforcement, is in conflict with the due process clause of the Fourteenth Amendment. If the statute does not authorize it, the decree is itself an invasion of the Federal right.

While it is not essential to the reversal of this decree, the plaintiffs in error contend, and but for the long practice to the contrary they would contend with great confidence, that a statute taking private property by eminent domain and providing for no award of damages to the property owner, but leaving him to a remedy at the expense of proceedings at law, does not fulfil the constitutional requirement of due provision for just compensation which is essential to due process of law. This is the ground of the fifth assignment of error. (Record, p. 53.)

No award of damages, except on trial in court, is made in such a case as this, by the street commissioners or any other tribunal. The statutes of 1888 and 1892, *supra*, are deemed to require them to make an award only when they themselves make the taking.

See *Rand* v. *Boston*, 164 Mass. 354, 356.
Danforth v. *Groton Water Co.*, 176 Mass. 118, and cases cited.

The purpose of the constitutional guaranty is to secure fair but full indemnity. To answer this purpose the provision for compensation must be such as to secure to the owner an equivalent in money for the property with which he is compelled to part. It should leave him as well off as it found him.

This is not effected by giving him merely a right to sue for his damages. The expenses of litigation make an inroad upon the damages recoverable. In a case of small amount they may, and sometimes do, absorb the whole, leaving the owner without any actual compensation.

The principle that expenses of litigation are a necessary incident of the legal enforcement of ordinary claims cannot properly be applied to the taking of property by eminent domain. The constitutional safeguards require that the owner be made whole. The requirement can be met only by providing for some award or assessment of damages to be made, as of course, without the necessity of suit; which the owner can take without diminution, as an alternative to the expensive process of appealing to the courts. Merely to give him a right of action is to comply with the requirement in form, while violating it in substance.

This finds some support in the court which made this decree.

See *Haverhill Bridge* v. *Essex Comm'rs*, 103 Mass. 120, 125.
Attorney General v. *Old Colony R.R. Co.*, 160 Mass. 62, 90.

Another consideration illustrates the inequity of the present decree.

In the ordinary case the owner of property taken by eminent domain has not only the security of the statutory provision for compensation, but if for any reason that provision fails, equity will exclude the taker and restore the orginal owner to possession; so solicitous is the law for his protection.

Attorney General v. *Old Colony R.R.*, 160 Mass. 62, 90, and cases cited.

Rockport Water Co. v. *Rockport*, 161 Mass. 279, 280, and cases cited. Cases collated, 159 U.S. 389.

Here, while the city, which alone is made liable for damages, is refusing to pay, and contesting any obligation to pay, as it has a right to do, the state court proceeds to destroy the property, putting it beyond reach of restoration; and this notwithstanding it is beyond the power of that court to finally determine the liability of the city, which power belongs to this court alone.

The decree cannot be justified under the police power to deal with nuisances or purprestures, though the state court seems to regard this as the latter. (Record, p. 59.) There is no nuisance, in any view of the statute, and no purpresture unless the public has lawfully acquired a complete title to the easement claimed. Moreover, the information and the decree stand solely upon the statute of 1898. This statute being held by the state court to be an exercise of the power of eminent domain, which construction will be accepted by this court, especially as it appears to be the necessary construction, the statute must be dealt with as an act of eminent domain, and the decree as an attempt to enforce an act of eminent domain; subject to all the constitutional restraints which affect the exercise of that power.

It may be suggested that the plaintiffs in error have delayed to press their petition for damages against the city. This, if so, does not affect the constitutionality of the statute; but it is not so. While the record shows that at the time when the agreed facts

were filed, December 30, 1900, the petition had not been "marked for trial" (Record, p. 44), it does not show that it could have been marked for trial earlier, or reached for trial if marked; and therefore shows no delay. But the conclusive answer is that the petitions for damages could not properly be tried until it was determined how far the building must be cut down or altered to conform to the judicial view of the statute; as, until that was determined, the extent of the damage, especially under section 3 of the statute, and the amount recoverable, if anything is recoverable, could not be known or ascertained. This was undetermined until the final decree in this case, March 13, 1901. That decree must be dealt with according to the facts as they existed when it was made. Down to that time it is clear that the petitions for damages could not properly have been tried. And as the decree is brought in question by this writ of error, it is not to be expected that the petitions will be tried until the writ of error is disposed of.

The reversal of the decree will not interfere with trial of the petitions for damages. The power of the state court to make such a decree, if and when the provision for damages is conclusively held valid and enforceable as against the city, is not now in question; and its opinion has defined the extent of the damage.

The only course by which this statute, assuming all parts of it to be valid, can be worked out consistently with the right of the plaintiffs in error to just compensation as essential to due process of law, is to determine to what extent the building must be cut down or altered to conform to its view of the statute, — which the court has now done by its final opinion and decree, — and thereupon, the extent of the dam-

ages being thus ascertained, to allow the owners proper opportunity to try, in the proceeding against the city of Boston, the validity of the provision for damages, on which the validity of the taking depends, before entry or execution of this or any similar decree.

Summary.

The only question is whether this decree for the cutting down of the building, at the time and under the circumstances disclosed, is to be sustained. This depends upon the question whether the statute makes due provision for just compensation, as essential to due process of law in the exercise of eminent domain, with such certainty as to warrant the decree.

All authorities agree that due provision for just compensation is essential to the validity of an act of eminent domain, without which the act is a nullity. The rule of this court, of the Massachusetts court, and of most others, is that the provision must be substantially certain.

Substantial certainty of compensation cannot be predicated of a statute which leaves the right to depend upon the event of litigation with a third party which disputes, has a right to dispute, and has reasonable grounds for disputing, its liability. The alternative to certainty is uncertainty; and this means that the provision *may* fail; which is fatal to the statute. If the provision for compensation is insufficient, the attempted taking is void, the public has acquired no rights in the estate, and the court has no power to molest it.

Under constitutions substantially the same in this particular as that of Massachusetts, this court has held that the title to property taken by eminent domain does not pass from the owner in advance of payment of compensation. The court is at liberty to

apply this rule, in the present case, in determining what degree of security for compensation is essential to the Federal requirement of due process of law. It may reasonably be held that this forbids the passing of the title, so as to warrant occupation, or destruction of the property, until it is paid for. If title to the easement sought to be taken here has not vested in the public, it follows that this decree for the cutting down of the building at this stage, is a deprivation of property without due process of law.

Sweet v. *Rechel*, *supra*, in which this court held that it is within the power of the legislature of Massachusetts to divest, by express words, the title of the owner of property taken by eminent domain in advance of payment, is materially different from the present case in several particulars. (1) There the court was construing the constitution of Massachusetts, in the light of the Massachusetts decisions, which were of persuasive authority; *Burgess* v. *Seligman*, 107 U.S. 20, 33. Here the court is construing the due process clause of the Federal constitution, according to its own views of what is essential to due process of law, on principles of general jurisprudence. (2) There the question did not arise between the taker of the property and the owner seeking compensation, but between third parties, on a collateral question, long after the property had been taken and the record owner paid for it. (3) There the statute expressly provided that title should vest in the city upon the taking, which was the real ground of decision. This statute contains no such provision. (4) There the city made the taking, and was thereby estopped to deny its validity or its own liability to damages. Here the city had no part in the taking, and disputes, and is at liberty to dispute, both. (5) There the court held the provision for compensation to be certain; there being no element

of uncertainty in it except the credit of the city. Here the *liability* of the city is disputed and is uncertain. The case lends no support to this decree.

The decree cannot be sustained consistently with the fundamental conception of due process of law in the exercise of eminent domain, or with the views hitherto expressed by this court.

ALBERT E. PILLSBURY,
GRANT M. PALMER,
of Counsel for the Plaintiffs in Error.

Supreme Court of the United States.

October Term, 1902.

WILLIAMS et al

v.

KNOWLTON.

No. 116.

Supplemental Brief of Plaintiffs in Error.

The brief of the defendant in error attempts to support the statute and decree upon the police power; and at the argument the question was put from the bench whether the decree should be reversed if the court should think that this statute could have been passed in the exercise of that power.

We have not fully discussed this question because we have not understood it to be now open. The State court having adjudged the statute to be an act of eminent domain, we have assumed that this court will accept that construction, and deal with the statute accordingly; relying on "the elementary rule that this court accepts the interpretation of the statute of a State affixed to it by the court of last resort thereof," as declared in Cargill Co. *v.* Minnesota, 180 U. S. 452, 466, and cases cited.

If this is not conclusive, the answer suggested at the argument by Mr. Justice Peckham appears to be. It cannot be assumed that the legislature would have done this thing at all, except by eminent domain with provision for compensation. No such act of the legislature has ever been passed, and it would seem, therefore, that its power to pass such an act is not and cannot in this case be brought in question or considered.

Nor can it be assumed that the State court would have made this decree except in view of what it seems to consider adequate constitutional provision for compensation, nor that it would have sustained the statute at all without compensation. Each opinion of the court expressly stands on the provision for compensation; Record, pp. 54, 55, 56, 57, 60, 61. The *obiter* remark that "it would be hard to say that this statute might not have been passed in the exercise of the police power," was made in the first opinion, on demurrer, and before the facts, showing the stage of the enterprise at which the statute fell upon it, and the large investments, expenditures, demolition of buildings, and other acts done by the owners on the faith of the then existing law and of their permit (shown in the Record, pp. 28, 29, which please observe), were presented to the court. (Record, pp. 54, 27.) The only effect of this remark is to make it further certain that, in the view of the court, the act was *not* passed in the exercise of the police power.

Accordingly, for this court to entertain the argument based on the police power would be to attribute to the legislature an act which it has never done, and which presumably it never would have done; and to the State court a view of the law which it has not adopted, and cannot be supposed to have entertained; in order to sustain a statute passed and a decree made upon directly

opposite grounds, and to deny an asserted Federal right for a reason upon which neither court nor legislature ever stood, or presumably would have stood, to deny it.

If it is ever to be adjudged the law of the land that the States may restrict to ninety feet the height of all buildings, of any and every character (as this statute does) without consideration of the right of property owners to compensation under any circumstances (for if they are not entitled to compensation under the circumstances here disclosed they can hardly be in any case), it cannot be done until some State has made the attempt and raised the question. It is not raised here.

Such a statute as this, applied to this estate under such conditions, is essentially and necessarily a *taking*, and not a mere regulation, of property rights, as the legislature recognized and the State court held it to be. Authorities *infra*, and in original brief, p. 16.

The suggestion of counsel in argument that the public safety enters into the question is unfounded. Not a word in this record tends to show that this factor is in the case, or that the legislature or the court dealt with the subject with any reference to such a question. This wholly distinguishes the case from Salem *v.* Maynes, 123 Mass. 372, which was the case of a fire ordinance against wooden buildings. Nor is the application of that decision to a wooden building for which the cellar had been begun, a contract made, and some lumber bought, all apparently of small amount, sufficient warrant for its application, if it could otherwise be applied, to an enterprise of the character and magnitude shown in this record, arrested *in medias res* by this statute, with more than half a million of dollars already expended, and other contracts out and largely executed. (Agreed facts, Record, p. 29.)

The State court holds the building a purpresture

(Record, p. 59). A purpresture is an encroachment upon the *public domain*. If the public has not acquired title to the easement of exclusion above the height of ninety feet in the estate of the plaintiffs in error, there is no public domain there, and no purpresture, at least until the public title becomes complete by payment of compensation. (Authorities in original brief, p. 19). But exclusive public domain in or over private property cannot be acquired without compensation, by exercise of the police power. If it could be, every highway could be laid out free of compensation, on the ground of the public necessity; a higher ground than any which can be claimed for this statute.

Parker *v.* Commonwealth, 178 Mass. 199, a later case than the present, under a later but similar statute which exposes the real purpose of both, is highly instructive. There the legislature undertook in terms, in restricting the height of buildings about the state-house, to provide compensation only if and so far as the owners had a constitutional right to it. The court, by HOLMES, C. J., rejects the qualification; holds that without an express legislative adjudication that the public welfare requires the owners to be deprived of their rights without compensation, they are entitled to it; and casts all possible doubt upon the power of the legislature to make such an adjudication in any such case. If doubtful there, much more is it doubtful here. This case makes it substantially certain that the statute of 1893 would not have been sustained by the State court in the exercise of the police power without compensation.

If it were open to sustain the judgment upon the police power the question would be, whether it is consistent with

the Federal requirement of due process of law for a legislative decree to restrict to 90 feet the height of such a building as this, *at the time and under the circumstances disclosed in this record*, without compensation to the owners. (Wisconsin R.R. *v.* Jacobson, 179 U. S. 287, 301.) This would first call for examination of the history of the enterprise, shown in the agreed facts. (Record, pp. 28–32, 43–49.)

The current of authority is strongly against legislative power to declare or deal with such a building as this as a nuisance, or to apply such legislation under such conditions in the exercise of the police power, or, upon any ground, to cut down private rights to such an extent as that here disclosed, without compensation as for a taking of property. A judicial view of the subject which comes near being universal might well be deemed conclusive in determining, if it were presented, the question of what degree of respect and security for property rights in this regard is essential to the Federal requirement of due process of law. In addition to cases before cited see:

Yates *v.* Milwaukee, 10 Wall. 497.

Pumpelly *v.* Green Bay Co., 13 Wall. 166, 177, *et seq.*

Sweet *v.* Rechel, 159 U. S. at pp. 396 *et seq.*

(This case, cited in the original brief, is important upon the question of the sufficiency of the provision for compensation; the test applied by this court, under the constitution of Massachusetts, being that the statute must give the property owner "*an unqualified right to a judgment* for the amount of his damages." 159 U. S. at p. 402.)

Mass. Decl'n of Rights, XII, XXX.

Baker *v.* Boston, 12 Pick. 184, 194.

Commonwealth *v.* Alger, 7 Cush. 53, 103–4.

Morse *v.* Stocker, 1 All. 150, 157–8.

Watertown *v.* Mayo, 109 Mass. 315, 319.

Lowell *v.* Boston, 111 Mass. 454.
Sawyer *v.* Davis, 136 Mass. 239, 243.
Wilkins *v.* Jewett, 139 Mass. 29.
Newton *v.* Belger, 143 Mass. 598.
Rideout *v.* Knox, 148 Mass. 368, 374.
Miller *v.* Horton, 152 Mass. 540, 543, 547-8.
Com. *v.* Parks, 155 Mass. 531, 533.
Langmaid *v.* Reed, 159 Mass. 409, 411.
Bent *v.* Emery, 173 Mass. 495.
Quintini *v.* Bay St. Louis, 64 Miss. 483.
Waupen *v.* Moore, 34 Wis. 450.
Janesville *v.* Carpenter, 77 Wis. 288, 301, 304.
Priewe *v.* Wisconsin, &c., Co., 93 Wis. 534.
Priewe *v.* Wisconsin, &c., Co., 103 Wis. 537.
Ex parte Whitwell, 98 Cal. 73, 78.
People *v.* Elk River Co., 107 Cal. 221, 227.
State *v.* Railway Co., 68 Minn. 381, 385.
Platt *v.* Waterbury, 72 Conn. 531, 551.
Ruhstrat *v.* People, 185 Ill. 133, 141.
Williamson *v.* Liverpool Ins. Co., 105 Fed. 31, and cases cited.
Mayor of Hudson *v.* Thorne, 7 Paige, 261.
Evansville *v.* Miller, 146 Ind. 613.
Des Plaines *v.* Poyer, 123 Ill. 348.

The information and decree stand solely upon the statute of 1893. The construction put by the State court upon that statute as an act of eminent domain is the necessary construction. There is no question of the police power in the case. The statute must be dealt with as an act of eminent domain, and the decree as an attempt to enforce an act of eminent domain; subject to all the constitutional restraints which affect the exercise of that power.

In view of a suggestion of counsel in argument, that the plaintiffs in error have delayed to press their petitions for damages against the city, we refer to the answer to that suggestion on pages 35, 36, of the original brief; and in view of some other observations, attention is called to the agreed facts set out in the Record, page 31.

The plans and photographs referred to in the Record, pages 29, 32, 45, 48, 49, were filed with the record and are in possession of the clerk. It was not deemed necessary to reproduce them, as they were not understood to be material to the question argued.

A. E. PILLSBURY,
G. M. PALMER,
For the Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

No. 116. October, 1902.

HENRY BIGELOW WILLIAMS et al.

v.

HERBERT PARKER, ATTORNEY-GENERAL OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an information by the Attorney-General of the Commonwealth of Massachusetts to prevent the erection and maintenance of that portion of a building on Copley Square in the city of Boston which has been erected above the limit of height prescribed by Chapter 452 of the Acts of the Legislature of Massachusetts for the year 1898. This act is as follows: —

AN ACT RELATIVE TO THE HEIGHT OF BUILDINGS ON AND NEAR COPLEY SQUARE IN THE CITY OF BOSTON.

Be it enacted, etc., as follows: —

SECTION 1. Any building now being built or hereafter to be built, rebuilt or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce Building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be completed, built, rebuilt or altered to the height of ninety feet, and no more; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt or altered to the height of one hundred feet, and no more: *provided, however*, that there may be erected on any such building, above the limits hereinbefore pre-

scribed, such steeples, towers, domes, sculptured ornaments and chimneys as the Board of Park Commissioners of said city may approve.

SECT. 2. The provisions of chapter three hundred and thirteen of the acts of the year eighteen hundred and ninety-six, and of chapter three hundred and seventy-nine of the acts of the year eighteen hundred and ninety-seven, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in section one of this act.

SECT. 3. The owner of or any person having an interest in any building upon any land described in section one of this act, the construction whereof was begun but not completed before the fourteenth day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by section one of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit prescribed for that locality by section one of this act, less the value of such materials as are not required on account of the limitations resulting from the provisions of this act, and the actual cost or expense of any re-arrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

SECT. 4. Any person sustaining damage or loss in his property by reason of the limit of the height of buildings provided for in this act, may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

SECT. 5. This act shall take effect upon its passage. (Approved May 23, 1898.)

The Supreme Judicial Court of Massachusetts upheld the information and ordered that the offending portion of the building be removed. The decree in full is found upon pages 50 and 51 of the record. The plaintiffs in error duly objected that the Act was in conflict with the Fourteenth Amendment of the Constitution of the United States, and this case is now brought to this Court on a writ of error by the original defendants to determine whether the said Act is, or is not, in conflict with the Fourteenth Amendment.

The defendant in error has been notified by counsel for the plaintiffs in error that their argument will be limited to the first

six assignments of error, which raise merely the question whether or not the statute in question deprives the plaintiffs in error of their property without due process of law.

I.

The Statute Provides for Ample Compensation for any Injury to Property Due to Its Enactment.

In considering the question whether the Massachusetts statute in question is in conflict with the Federal Constitution, it is to be observed that that statute attempts fully and carefully to prescribe the remedies open to the parties injured by the passage of the Act, so as to give them full and complete compensation. Section 3 of the Act provides at considerable length for the payment of damages incurred by any person, and by the plaintiffs in error in particular, through any change in the construction of a building in process of erection at the passage of the Act. It is submitted that this provision is full and complete, and provides for every contingency of loss.

Furthermore, Section 4 gives a sweeping remedy to any person injured by the passage of the Act. It is submitted that the two provisions together cover every possible element of loss which has been suffered by these plaintiffs in error, if indeed there is any loss for which they can recover.

II.

The Act was Passed under the Police Power of the Legislature, and Compensation was Unnecessary.

We submit that it was entirely within the province of the Legislature of Massachusetts to pass this statute, basing it upon the police power inherent in every government. The statute does no more than hundreds of other such acts have done, the constitutionality of which has never been questioned, in limiting the height of buildings within certain localities.

The competency of the Legislature to pass such acts has never been doubted.

People *ex rel.* Kemp *v.* D'Oench, 111 N. Y. 359.

Such enactments are for the safety, comfort and convenience of the people, and for the benefit of property owners generally.

Knowlton *v.* Williams *et al.*, 174 Mass. 476. (Rec., p. 55.)
Commonwealth *v.* Colton, 8 Gray, 488.
Salem *v.* Maynes, 123 Mass. 372.

It is not essential that such a regulation should apply to all parts of the community, but the Legislature may, if it sees fit,

select a limited portion of some city or town to which such regulation shall apply.

Watertown *v.* Mayo, 109 Mass. 315.
Salem *v.* Maynes, 123 Mass. 372.

Such a legislative limitation is both "wholesome" and "reasonable," which is the only limitation put by the courts upon the exercise of the police power.

Commonwealth *v.* Alger, 7 Cush. 53, at p. 85, by Shaw, C. J.
Sawyer *v.* Davis, 136 Mass. 239.

The test which has been laid down by this court has been the maxim *sic utere tuo ut alienum non lædas*, and the Legislature always has the power to prevent an individual from doing any act upon his property which will be to the injury of the public.

Munn *v.* Illinois, 94 U. S. 113.
Mugler *v.* Kansas, 123 U. S. 623.
Crowley *v.* Christensen, 137 U. S. 86.

In Lawton *v.* Steele, 152 U. S. 133, this court in discussing the limits of the police power, and after specifying certain examples of the exercise of that power, says, "Beyond this, however, the state may interfere whenever the public interests demand it, and in this particular a large discretion is vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interest of the public generally is distinguished from those of a particular class requiring such interference, and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

It is clear from the allegations of the information as admitted in the agreed statement of facts, that this case comes within this limitation. We have here a public square surrounded by public buildings, in themselves of great value, filled with treasures of literature and art of practically priceless value. The danger from fire to these public buildings was an entirely sufficient basis for passing this statute. Furthermore, the importance of an adequate supply of light to the Art Museum and Public Library, as well as to the public square and adjacent streets, was, in itself, an entirely adequate basis for the passage of this statute.

It is entirely immaterial that the Legislature in its generosity chose to make compensation to the owners of property injured by the passage of this Act, because the making of compensation is not incident to the exercise of police power, and the fact that compensation is given does not, and cannot, change the particular power under which the Legislature acted.

III.

The Statute Regarded as an Exercise of the Power of Taking by Eminent Domain.

It is true that this provision for compensation does conform to the constitutional requirement for the taking of property by the right of eminent domain, and if the court looking at all the circumstances should think that it was the intention of the Legislature to take certain rights in light and air and in the view over adjacent land, above the line to which buildings may be erected, in the nature of an easement annexed to the streets and public squares adjoining, the statute is in all respects in accordance with the rules regulating the taking of property by right of eminent domain. Whatever contention the plaintiffs in error may make as to whether Copley square is in a technical sense such a park as was contemplated by the statutes of Massachusetts providing for the establishment of public parks, there can be no question that, under the deeds of conveyance under which the city took the land comprising Copley square, it is a park in the popular sense, and is at any rate an open square belonging to the public, and to be used by it certainly under the limitations of the deeds conveying it.

Copley Square is clearly a public park within the definitions in the adjudicated cases.

"A park is a piece of ground enclosed for purposes of pleasure, exercise, amusement or ornament."

Perrin *v.* N. Y. Central R. R. Co., 36 N. Y. 120, 124.

A park is "a place for the resort of the public for recreation, air and light."

Price *v.* Inhabitants of Plainfield, 40 N. J. L. 608, 613.

"The term park signifies an open space intended for the recreation and enjoyment of the public."

Archer *v.* Salina City, 93 Cal. 43, 50.

A park need not necessarily be open to the public. It may be "intended to be kept open for prospect, air and light, or as a protection against the spread of fires, and other purposes, and not intended to be entered upon or used by travelers."

Foster *v.* Park Commissioners, 133 Mass. 334, 335.

IV.

The Statute in Question Provides Fully for Due Process of Law for Any Injured Party.

The question "What is due process of law" has been defined and discussed so many times by this court in recent years that

it seems almost unnecessary to cite authorities. While this court has never been willing to define with precision the limits of what may be construed to be due process of law, it has over and over again repeated that due process means only such process as recognizes the right of the owner to be compensated if his property be taken from him and transferred to the public. All that is essential is that a proper inquiry should be made as to the amount of compensation, and this constitutes "due process." There can be no question that this statute falls fully within these limitations.

C. B. & Q. R. R. *v.* Chicago, 166 U. S. 226.
Sweet *v.* Rechel, 159 U. S. 380 (to which case we would call special attention).

It is well settled that the federal courts ought not to interfere, especially with a statute which has been declared constitutional by the State Supreme Court, unless it clearly appears that there is some abuse of law amounting to confiscation of property or deprivation of personal rights.

Cass Farm Co. *v.* Detroit, 181 U. S. 396.

It is not necessary that there should be any particular mode of proceeding in the state court for the recovery of compensation.

Simons *v.* Craft, 182 U. S. 427.

The Fourteenth Amendment in no way undertakes to control the power of a state or to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for this purpose gives reasonable notice and affords fair opportunity to be heard before the issues are decided.

Iowa Central Ry. *v.* Iowa, 160 U. S. 389.

A large discretion is necessarily vested in the State Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.

Holden *v.* Hardy, 169 U. S. 366.

It is not necessary that compensation should be determined in advance of the taking. It is sufficient if any adequate provision for compensation is made. Proper inquiry as to the amount of the compensation constitutes due process.

Backus *v.* Fort St. Union Depot Co., 169 U. S. 557.

Due process of law is process according to the law of the land. This process is regulated by the law of the state.

French *v.* Barber Asphalt Co., 181 U. S. 324.

If this statute in question can be construed as an exercise of the power of taxation, the rule is still the same.

Davidson *v.* New Orleans, 96 U. S. 97.
Mobile *v.* Kimball, 102 U. S. 691.
Hagar *v.* Reclamation District, 111 U. S. 701.
Fall Brook Irrigation District *v.* Bradley, 164 U. S. 112.

V.

The Burden of Making Compensation was Legally Imposed on the City of Boston.

Nor does it make any difference with the constitutionality of the statute that the Legislature of Massachusetts has imposed the entire burden of this public improvement upon the city of Boston.

Sweet *v.* Rechel, 159 U. S. 380.
Willard *v.* Presbury, 14 Wall. 676.
Bauman *v.* Ross, 167 U. S. 548.
Webster *v.* Fargo, 181 U. S. 394.
Williams *v.* Eggleston, 170 U. S. 304.
Freeland *v.* Hastings, 10 Allen, 570.
Kingman, Petr., 153 Mass. 566.
Old Colony Railroad *v.* Framingham Co., 153 Mass. 561.

In this last named case the Supreme Court of Massachusetts says with reference to the provision for compensation in the statute under consideration in that case, "under the constitutions of several states, and probably under the decisions of the courts in some others, this provision for compensation would not be held sufficient, and a statute of this kind would be unconstitutional. But in this Commonwealth the law is settled differently."

In Kingman, Petr., the court examines at great length the power of the Legislature to impose the expense of a public improvement upon a particular locality, and determines that in Massachusetts, at least, this is entirely in accordance with the constitution.

It is familiar law, of course, that the decision of a supreme court of a state in construing its own constitution is binding on this court.

Iowa Central R. R. Co. *v.* Iowa, 160 U. S. 389.
Orr *v.* Gilman, 183 U. S. 278.

This court is bound to give the same meaning to a state statute as was given it by the supreme court of the state.

Stockard *v.* Morgan, 185 U. S. 27.
Missouri Pacific Ry. *v.* Nebraska, 164 U. S. 403.

It must be remembered that Massachusetts has a provision in its constitution in the Fourth Article, Section 1, Chap. 1, conferring upon the General Court full power and authority to make "all manner of wholesome and reasonable orders, the same to be not repugnant or contrary to the Constitution," and the Supreme Court of Massachusetts has said that this provision gives the Legislature a wide authority, and one more comprehensive than that found in the constitutions of other states.

Opinion of the Justices, 163 Mass. 589.
Turner *v.* Nye, 154 Mass. 579.
Kingman, Petr., *ubi supra.*

In Norwood *v.* New York, etc., R. R., 161 Mass. 259, the court says that the settlement of the expense of grade crossings in fixed proportions between the town, the state and the railroad company would not be a legitimate exercise of the power of taxation, but it was within the authority of the Legislature to enact all needful laws to provide for the convenience and safety of the public while traveling.

The Legislature of Massachusetts has even ordered a corporation to construct a fishway over its dam, although by its original charter it had constructed a dam without a fishway so as to destroy fishing rights, and had paid damages therefor.

Commissioners *v.* Holyoke Water Power, 104 Mass. 446.

It was argued in the state court that this statute in effect compelled the city of Boston to establish a park, and that it was not within the power of the Legislature to exercise such compulsion. This proposition, if correct, has no application to the present case, because it does not agree with the facts. It is to be remembered that Boston is the capital city of the Commonwealth of Massachusetts, and that the public buildings about Copley square are buildings in which the citizens of the entire Commonwealth have an interest. The gift of the Commonwealth to the city of Boston of the land upon which the Public Library was built was coupled with the agreement it should be open to all citizens of the Commonwealth free of charge. (Record, p. 27, referring to Chap. 222 of the Acts of the Legislature of Massachusetts for 1880.) The Art Museum is open to the entire public, and the Institute of Technology has been assisted by the Commonwealth on many occasions with grants of money in return for free scholarships open to citizens of the entire state.

The Legislature, apart from these considerations, had the entire right to promote the beauty and attractiveness of a public park in the capital of the Commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received.

Knowlton *v.* Williams, 174 Mass. 476 (Rec., p. 57).

This is a public improvement for the benefit of the entire Commonwealth, the expense of which might properly have been charged upon the citizens of the Commonwealth, but which the Legislature had entire power to place upon the city of Boston.

The real point involved in this proposition must be, therefore, that the statute contains no constitutional provision for compensation, because there was no authority in the Legislature to impose such payment upon the city of Boston, but this point is not in any way governed or controlled by the provisions of the Fourteenth Amendment to the Constitution of the United States. It is purely and simply a question under the constitution of the state of Massachusetts whether such a provision by the Legislature is permitted by that constitution, and this is a question on which the decision of the state court is conclusive, and with which this court has nothing to do. It has been decided in Michigan that the legislature of that state cannot constitutionally compel a municipality to provide money to purchase and construct a park, but that was a question under the constitution of the state of Michigan, and the doctrine of the Michigan court has not been followed in Massachusetts. The Legislature of Massachusetts has imposed at various times a sewerage system, a water system, and a park system upon the city of Boston and the adjoining cities and towns, constituting what the Legislature have called a Metropolitan District, and the constitutionality of such statutes has been affirmed after careful consideration.

Kingman, Petr., 153 Mass. 570 (sewers).
Adams, Petr., 165 Mass. 497 (parks).
De Las Casas, Petr., 178 Mass. 213 (parks).

This proposition was raised upon the brief of the plaintiffs in error before the Supreme Court of Massachusetts, and was fully argued, and must, therefore, be considered to be determined against the plaintiffs in error, although the opinion of the court (Rec., p. 61) is silent on the point.

Respectfully submitted for the defendant in error,

SAMUEL J. ELDER.
EDMUND A. WHITMAN.

Supreme Court of the United States.

No. 116—October Term, 1902.

Henry Bigelow Williams and Charles F. Ayer, Trustees, Plaintiffs in Error, *vs.* Herbert Parker, Attorney General of Massachusetts.	In error to the Supreme Judicial Court of the State of Massachusetts.

[February 23, 1903.]

On May 23, 1898, the legislature of Massachusetts passed the following act:

"Sec. 1. Any building now being built or hereafter to be built, rebuilt or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be completed, built, rebuilt or altered to the height of ninety feet, and no more; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt or altered to the height of one hundred feet, and no more: *Provided, however*, That there may be erected on any such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve.

"Sec. 2. The provisions of chapter three hundred and thirteen of the acts of the year eighteen hundred and ninety-six, and of chapter three hundred and seventy-nine of the acts of the year eighteen hundred and ninety-seven, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in section one of this act.

"Sec. 3. The owner of or any person having an interest in any building upon any land described in section one of this act the construction whereof was begun, but not completed before the fourteenth day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by section one of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit proscribed for that locality by section one of this act, less the value of such materials as are not required on

account of the limitations resulting from the provisions of this act, and the actual cost or expense of any rearrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

"SEC. 4. Any person sustaining damage or loss in his property by reason of the limit of the height of buildings provided for in this act, may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city." (Acts and Resolves of Massachusetts, 1898, chap. 452.)

The building of plaintiff in error comes within the scope of this statute, and on September 17, 1898, the attorney general of Massachusetts filed an information in the Supreme Judicial Court of that State to enjoin the maintenance of that part of the building above the ninety-feet line. To this information the defendants pleaded, among other things, that "the statute, . . . in its application to the defendants, . . . is in violation of the second clause of section 1 of the Fourteenth Amendment and of other provisions of the Constitution of the United States." Pending this proceeding the defendants commenced actions against the city of Boston for damages, as provided in sections 3 and 4 of the statute. The city filed a general denial. The defendants then moved that the attorney general be required to join the city as a party defendant, in order that the question of the city's liability to damages might be conclusively determined in this proceeding, or, in default of such joinder, that it be stayed until the city's liability could be conclusively determined. This motion was denied and the defendants appealed from the denial thereof. The facts were agreed upon and the case reserved by the presiding justice for the consideration of the full court. Upon March 13, 1901, a decree was entered, sustaining the contention of the attorney general, and directing a removal of those parts of the building above the height of ninety feet, without prejudice, however, to the right of defendants under the statute to maintain such steeples, towers, &c., as the board of park commissioners of the city of Boston should approve. (174 Mass. 476.) To review such judgment this writ of error was sued out.

Mr. Justice BREWER delivered the opinion of the Court.

Counsel for plaintiffs in error state in their brief that "the single question in the case is, substantially, whether it is consistent with due process of law for a court to decree the actual destruction of property under a statute of eminent domain by which the State takes certain rights in it, making provision for compensation only by giving the owners a right of action against a city for their damages, while the city, which had no part

in the taking, denies the validity of the provision for compensation, upon which the validity of the taking depends, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which is yet undetermined."

That the statute does not conflict with the constitution of the State is for this court settled by the decision of the State court. (*Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited; *Rasmussen* v. *Idaho*, 181 U. S. 198.) The constitutional provision of the State and that found in the Fifth Amendment to the Federal Constitution are substantially alike. The Massachusetts provision reads: "Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." (Declaration of Rights, Art. X.) And the Fifth Amendment says: "Nor shall private property be taken for public use, without just compensation."

So far as the Federal Constitution is concerned, it is settled by repeated decisions that a State may authorize the taking of possession prior to any payment, or even final determination of the amount of compensation. In *Backus* v. *Fort Street Union Depot Company*, (169 U. S. 557, 568,) we said:

"Is it beyond the power of a State to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas Railway*, (135 U. S. 641,) and *Sweet* v. *Rechel*, (159 U. S. 380.) There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof."

We pass, therefore, to inquire as to the adequacy of the provision for compensation. No question is made as to the general solvency of the city of Boston. Although in the agreed facts it is stated that the city has no "moneys specially appropriated to any such purpose as that prescribed by the damage clauses of this statute, nor any express statutory power or authority to raise, appropriate or pay money for such a purpose," yet as this statute provides that "any person sustaining damage . . . may recover such damage . . . in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway;" and as there is a general statute making suitable provision for such a recovery, the question of solvency does not seem to be material.

It is true that the city is not a party to the proceedings, and therefore not estopped to deny its liability by reason of having sought and obtained the condemnation. In that respect the statute differs from ordinary statutes giving to corporations, municipal or private, the right to condemn. While there is no technical estoppel by judicial proceeding, yet the

State Supreme Court adjudged the validity of the statute, not merely in respect to the taking, but also in respect to the liability of the city. In its opinion it said (p. 481):

"It may be contended that if the legislature could take this right for the use of the public, it could not require the city of Boston to make compensation for it, but should have provided for the payment of damages from the treasury of the Commonwealth. This contention would limit too strictly the power of the legislature in the distribution of public burdens. Very wide discretion is left with the lawmaking power in this particular. The legislature may change the political subdivisions of the Commonwealth by creating, changing or abolishing particular cities, towns or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. (*Kingman, Petitioner*, 153 Mass. 566, and cases and statutes there cited.)"

And this decision is in harmony with prior adjudications of that court.

It is also true that the proceeding here taken is in many respects novel. Perhaps no case like it has arisen in this country. But as the court of last resort of Massachusetts has treated it as a condemnation, a taking for the public use, it is a taking for the use primarily of the citizens of Boston, and comes within the repeated rulings of the State court in respect to the competency of the legislature to cast the burden thereof upon the city. And while, as stated, there may be no technical estoppel by judgment, yet in view of these rulings it would be going too far to hold that it is essential that there be a judgment establishing the liability of the city before it can be affirmed that adequate provision for compensation has been made.

That there may be novel questions in respect to the measure of damage, the value of the property that is taken, does not avoid the fact that a solvent debtor, one whose solvency is not liable to go up or down like that of an individual, but is of substantial permanence, is provided, as well as a direct and appropriate means of ascertaining and enforcing the amount of all such damage. In view therefore of the prior decisions of the Supreme Court of the State as well as that in this case, we are of opinion that it cannot be held that there was a failure to make adequate provision for the payment of the damages sustained by the taking.

We have not considered any question of purely State cognizance, nor have we stopped to comment on the suggestion made by the Supreme Court of the State, that this statute might be sustained as an exercise of the police power, or if it could be so sustained, that it could be enforced without any provision for compensation. Considering simply the distinct proposition so ably presented by the counsel for plaintiffs in error, we are of opinion that the statute in question cannot be adjudged in conflict with the Federal Constitution, and therefore the judgment of the Supreme Judicial Court of Massachusetts is

Affirmed.